Supreme Court, U. S.
FILED
APR 4 1977
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1354

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD AND OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, George A. Angle d/b/a Kansas Refined Helium Company, respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 7, 1976, as amended on January 4, 1977.

## OPINION BELOW

The Opinion of the Court of Appeals, unofficially reported at 92 LRRM 3059, appears in the Appendix hereto. The Report of Special Master containing recommended findings of fact and conclusions of law also appears in the Appendix hereto.

## JURISDICTION

The Opinion of the Court of Appeals for the District of Columbia Circuit was entered on June 7, 1976. A timely Petition for Rehearing *en banc* was denied on January 4, 1977, and the Opinion of the Circuit Court of Appeals was amended on said date. This Petition for Certiorari was filed within ninety (90) days of January 4, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. May a Circuit Court of Appeals adopt a new standard of appellate review which is contrary to the Federal Rules of Civil Procedure and prior Circuit Court and Supreme Court decisions interpreting such Rules?
2. Can an employer be forced to make promises under oath in the manner of the medieval practice of recanting or abjuration, under the disguise that it effectuates the policies of the National Labor Relations Act?
3. May a Circuit Court of Appeals order an employer to bargain with a union into infinity?

## STATUTORY PROVISIONS INVOLVED

*United States Code, Title* 28:

Rule 52 of the Federal Rules of Civil Procedure. Findings of the Court.

> "(a) Effect. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. . . ."



Rule 53 of the Federal Rules of Civil Procedure. Masters.

> ". . .
>
> "(e)(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. . . ."

## STATEMENT OF CASE

The National Labor Relations Board's Fourth Amended Petition for adjudication in civil contempt, was filed with the District of Columbia Circuit Court of Appeals on or about July 20, 1973, and alleged that George A. Angle and Al Pesicka had violated the Circuit Court of Appeals' judgment by engaging in various acts of interference, restraint and coercion, including discharging and failing to properly reinstate four employees (Arel Rodgers, Hilary Luft, Brian Brack, and Harold Straub), and by implementing certain changes in employees' working conditions without affording the Union adequate notice and a reasonable opportunity to bargain about such changes. George A. Angle d/b/a Kansas Refined Helium Company (hereinafter referred to as "Angle"), answered said allegations denying that he had engaged in contemptuous conduct and raised certain affirmative defenses. On January 12, 1973, Arthur J. Stanley, Jr., Senior Judge, United States District Court for the District of Kansas, was designated Special Master by the

Circuit Court of Appeals to hear evidence and make recommended findings of fact and conclusions of law.[1] In his Report, issued on March 11, 1975, Judge Stanley found that Angle had not violated the judgment in any respect as alleged by the Board and recommended that the Circuit Court absolve Angle of the contempt charges. (Appendix, p.A2).

On April 22, 1975, the National Labor Relations Board filed exceptions to the Special Master's Report. The District of Columbia Circuit Court of Appeals issued an Opinion and Order overruling the Special Master and finding Angle in civil contempt of the court, and directing that Angle purge himself of contempt by performing specific acts as outlined in the court's Order. (Appendix, pp.A37-A38).

## REASONS FOR GRANTING THE WRIT

1. The Order below is in error and was decided in a way contrary to Rules 52(a) and 53(e)(2) of the Federal Rules of Civil Procedure and prior Circuit Court and Supreme Court decisions interpreting the proper standard for review of a Special Master's recommended findings of fact and conclusions of law.

2. The Order below requires Angle to make promises under oath in a manner of the medieval practice of recanting or abjuration contrary to the rights guaranteed him by the First Amendment to the United States Constitution.

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[1]While in its Amended Petition the Board sought to impose sanctions against Pesicka, including a request that he be found in contempt, pay fines and purge himself of contempt by engaging in certain conduct, Pesicka was never served with a summons or other process in this proceeding or afforded notice of discovery proceedings. Contempt proceedings against Pesicka were therefore dismissed.



3. The Order below is in error and requires Angle to bargain into infinity with the Union, contrary to Circuit Court and Supreme Court decisions and the public policy of the National Labor Relations Act.

### 1. The Order Below Is in Error and Was Decided in a Way Contrary to Rules 52(a) and 53(e)(2) of the Federal Rules of Civil Procedure and Prior Circuit Court and Supreme Court Decisions Interpreting the Proper Standard for Review of a Special Master's Recommended Findings of Fact and Conclusions of Law.

The proper standard for review of a Special Master's recommended findings of fact and conclusions of law is well established through Federal Rules of Civil Procedure 52(a) and 53(e)(2), *supra*, and case law interpreting said Rules. The United States Supreme Court in *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950), while interpreting the provisions of Rule 52, stated:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citations omitted). We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'" (339 U.S. at 494).

The Court again reviewed the "clearly erroneous" standard in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and held:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that

their function is not to decide factual issues *de novo*. *The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to the decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence.* The question for the appellate court under Rule 52(a) is not whether it would have made the finding the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'" (395 U.S. at 123). (Citations omitted). [Emphasis added].

The Circuit Courts have in a like manner interpreted the "clearly erroneous" standard.[2]

Although in the instant case, the District of Columbia Circuit Court of Appeals acknowledged that the "clearly erroneous" standard governed appellate review of a Master's Report (Appendix, pp.A27-A28), *the court*, where it deemed the Master to have failed to recite evidence as to certain issues, proceeded to *adopt a new standard of review*, which included *retrying issues* of fact, *evaluating credibility* of witnesses' testimony, *resolving ambiguities differently* than the Master, and *finding a more sinister cast* to actions which the Master deemed not contemptuous. The Circuit Court's self-made standard in the present case is clearly contrary to the provisions of the Federal Rules of Civil Procedure 52(a) and 53(e)(2) and Circuit Court and Supreme Court law interpreting said Rules.

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[2]*See, Dailey* v. *City of Lawton, Okla.*, 425 F.2d 1037, 1040 (10th Cir. 1970); *Sanitary Farm Dairies, Inc.* v. *Gammel*, 195 F.2d 106, 118 (8th Cir. 1952).



**A. The Master is presumed to have had the whole record in mind when making his findings of fact and conclusions of law.**

As previously recognized by the Circuit Court of Appeals for the District of Columbia Circuit in *Bishop* v. *United States*, 223 F.2d 582 (1955):

> *"A trial judge is not supposed to recite the evidence upon which he bases a finding, and the validity of his finding does not depend upon what an appellate court thinks he had in mind at the moment; he is presumed to have had the whole record in mind.* There are in many cases ultimate findings that must be supported by intermediate underlying findings. . . . But every fact—all the way from atomic nuclei to astronomical galaxies—is ultimate to some propositions and underlying to others, and so every fact is underlain by other facts. The law is practical in this respect, and while it looks for supporting finding to many sorts of ultimate findings, it also *deals with many findings as arising directly from the evidence without the interposition of separate supporting* findings. . . ." (223 F.2d at 587). [Emphasis added].

However, in the present case, the Circuit Court ignored its holding in *Bishop, supra*, and overturned the Master's ultimate finding of fact on the rationale that the Master's Report failed to make a finding as to certain underlying facts.

The following are examples where the Circuit Court, through its own interpretation of evidence not expressed as a finding in the Master's Report, overruled the Master's finding of noncontemptuous conduct:

1. ". . . the Master's failure to make *any* findings regarding a second change in insurance coverage,

occurring at the end of 1972 with respect to the insurance policy effective during 1973." (Appendix, p.A.33);

2. "The Master made no finding regarding this theory, but in this instance that need not prevent us from supplementing his findings.... We thus find this notation to have been contemptuous." (Appendix, p.A41);

3. "We are handicapped by the Master's failure to make findings on this issue, but we believe the record is clear enough to enable us to make the determination ourselves." (Appendix, p.A49);

4. "Particularly in view of the Master's failure to consider explicitly what we believe to be the critical testimony, we find ourselves forced to reject as clearly erroneous his finding that Luft could not reasonably fear the imposition of discipline." (Appendix, p.A54); and

5. "The very strong evidence in the record—not considered by the Master—that Angle was motivated by improper motives, and the highly implausible nature of the explanation offered by respondent and the Master for Straub's discharge, lead us to reject the Master's finding as clearly erroneous and to find Straub's discharge to be illegal." (Appendix, p.A62).

**B. Evaluating the veracity and credibility of witness testimony.**

In interpreting the standards governing appellate review of the findings of a Master, the First Circuit Court of Appeals in *United States* v. *S. Volpe & Co., Inc.*, 359 F.2d 132 (1966), held as follows:



> "This court has held that findings of a master are entitled to great weight and should not be disregarded unless clearly wrong. The rationale of this rule is that the master enjoyed the advantage of seeing and hearing the witnesses and was enabled thereby to judge their veracity and credibility and *the trial court must respect this advantage.*" (359 F.2d at 134). (Citations omitted). ([Emphasis added].[3]

In a similar manner, the District of Columbia Circuit Court of Appeals, in *Orient Mid-East Lines, Inc.* v. *Co-operative For American Relief Everywhere, Inc.*, 410 F2d 1006 (1969) held that:

> "We must point out again that it is *not the functions of this court to evaluate the credibility of the witnesses in determining whose version of the factual setting is correct.*" (410 F.2d at 1009). [Emphasis added].

In the present case, however, the District of Columbia Circuit Court repeatedly abridged the above-recognized standard and made its own evaluations of the credibility of witnesses' testimony to find contemptuous conduct where none had been found by the Special Master. Said evaluations are exemplified by the following:

1. In reviewing evidence of "tangible examples demonstrating the existence of [supervisory] authority," the court gave weight to the cold transcript of Angle and two non-supervisory employees' testimony to overturn the Master's finding that An-

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[3]*See also, McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975); *Thetford* v. *United States*, 404 F.2d 301 (10th Cir. 1968) (Appellate court is not to retry the facts and a finding based on sharply conflicting evidence is conclusively binding on the appellate court); *In re Vernon Hills, Inc.*, 348 F.2d 4 (7th Cir. 1965) (Finding that it is axiomatic that the determinations as to credibility made by the trier of fact are entitled to great weight).

gle's reorganization of the job structure at the KRH plant was not in violation of the court's order. (Appendix, pp.A35-A36);

2. In drawing conclusions as to reports of Rodgers while he was working at the KRH plant, the court, without the aid of viewing the demeanor of witnesses, gave credit to testimony rejected by the Master. (Appendix, p.A41); and

3. As to alleged statements by Pesicka, the court concluded:

   "We find no reason, however, to discredit Brack's testimony as to find that this second conversation did not take place." (Appendix, p.A43).

**C. Inferences drawn from evidence must be most favorable to the party prevailing before the Special Master.**

The Seventh Circuit Court of Appeals in *Aunt Mid, Inc.* v. *Fjell-Oranje Lines*, 458 F.2d 712 (1972), *cert. den.*, 409 U.S. 877, reviewed the standard governing appellate review of a district court decision and found that:

> "In determining whether there is a sufficient evidentiary basis for the court's findings of fact, we must take that view of the evidence and the inference deductible therefrom which is most favorable to the . . . [party prevailing below]." (458 F.2d at 718). (Citations omitted).

The standard applied by the Circuit Court in the instant case is directly contrary to the standard as pronounced by the Seventh Circuit in *Aunt Mid, Inc., supra.* The District of Columbia Circuit Court of Appeals repeatedly interpreted evidence and adopted inferences therefrom in



a manner that was disfavorable to the party who prevailed before the Special Master. Whereas, the Special Master completely exonerated Angle from the charges of contempt, the Court of Appeals reevaluated the witnesses' testimony and reviewed evidence in a manner that overturned all but one of the Master's findings of fact as to noncontemptuous conduct. The following exemplify the Circuit Court's failure to take "that view of the evidence and the inferences deductible therefrom which is most favorable to" Angle:

1. "Viewing the record in the proper light, it is apparent that the Master's finding cannot stand. For neither the Master nor respondent points to sufficient evidence in the record to indicate that the job reorganization took place in practice, rather than on paper, before September 10, 1971." (Appendix, p.A35); and

2. "The Master's report, however, fails to consider testimony in the record that was uncontroverted and not specifically discredited, describing subsequent events, at the outset of the meeting itself, that we believe gave rise to a reasonable belief that discipline might be imposed." (Appendix, p.A 52).

Throughout its Opinion, the Circuit Court stubbornly refused to defer to the decisions of the Special Master, particularly in reference to the appraisal and weighing of evidence presented before him. The lack of deference is expressly recognized by the court wherein it stated:

> "Were we reviewing a finding that Straub's discharge was legal by the NLRB in an unfair labor practice proceeding, we *conceivably* might feel compelled to defer to the Board's expertise. But in reviewing a

Master's finding, where less deference is required, . . . we believe we must reach a contrary finding and reject that of the Master as clearly erroneous." (Appendix, p.A61).

**D. Permissible conclusions of law rejected.**

Although case law provides that a Master's conclusions of law are entitled to no special deference from the reviewing court, and will be overturned whenever they are believed to be erroneous, the Tenth Circuit Court of Appeals in *United States* v. *Hunt,* 513 F.2d 129 (1975), further interpreted this standard of review by holding that:

"An appellate court is not called upon to decide whether the trial court reached the *correct conclusion of law, but only whether it reached a permissible conclusion.*" (513 F.2d at 136). [Emphasis added]. (See also, *Hudson* v. *Okada,* 472 F.2d 975 (10th Cir. 1973)).

In two specific instances, in the present case, the District of Columbia Circuit Court of Appeals found contemptuous conduct by finding that the Special Master had reached an incorrect conclusion of law rather than a permissible conclusion.

**1. Good faith defense to contempt charge of unilateral change in insurance coverage.**

In finding no contemptuous conduct to the unilateral change in insurance coverage, the Special Master found that "Angle was attempting to maintain the same insurance coverage at the lowest possible premium rate and that made a change in insurance carriers advisable." (Appendix, p.A20). In reviewing this determination, the court concluded that Angle's good faith did not justify a failure to bargain.



If the instant case involved judicial review of an alleged violation of Section 8(a)(5) of the National Labor Relations Act, rather than an adjudication of contempt of court, the court's reliance on *NLRB* v. *Katz,* 369 U.S. 736 (1972) to support its finding might have merit. However, Circuit Courts of Appeal have distinguished between violations of the National Labor Relations Act and contempt proceedings in determining that *good faith or lack of wilfulness prevents an adjudication of contempt.*[4] The Special Master's conclusion in the present case as to Angle's good faith was certainly a permissible conclusion of law in a civil contempt proceeding. In overruling this determination, the Circuit Court abridged the scope of appellate review as defined in Rules 52 and 53 of the Federal Rules of Civil Procedure.

**2. Angle should not be held in contempt for actions allegedly taken by plant superintendent, Pesicka.**

Virtually all the instances of interference, restraint, and coercion alleged by the Board were purportedly engaged in by Al Pesicka, plant superintendent. However, it was Angle, and not Pesicka or the Company, that was charged with contemptuous conduct before the court. The Special Master properly found that these instances did not constitute contempt on the part of Angle. (Appendix, pp.A20-A22).

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[4]*See, NLRB* v. *Corsicana Cotton Mills,* 178 F.2d 344 (5th Cir. 1949) (The record furnished no basis for a finding that respondent in respect to matters charged was deliberately or knowingly in contempt to the court's order); *Schauffler for and in behalf of the NLRB* v. *Local 1291, International Longshoremen Association,* 292 F.2d 182 (3rd Cir. 1961) (Where there is ground to doubt the wrongfulness of the conduct of a defendant, he should not be adjudged in contempt).

In overturning the Special Master's finding that Angle was not liable for Pesicka's actions, the Circuit Court held that:

> "[W]hatever the scope of Angle's express authorization or direction of Pesicka's activity, *as a matter of law* Angle is responsible." (Appendix, p.A38).

In making this determination, the court relied upon normal unfair labor practice cases wherein the employer was held responsible for the anti-union activities of supervisory employees. However, the instant case is not an unfair labor practice case. Rather, it is one involving actions by an individual which were allegedly in contempt of court. In order to support a proper finding of civil contempt, courts traditionally have required specific proof of actions taken by the individual charged with contempt. As stated in *U. S.* v. *Fleischman*, 339 U.S. 349 (1950), at headnote No. 4:

> "If an individual does all he can to comply with an order made by competent authority, he will not be punished for non-compliance because of recalcitrance of others."

Another line of cases has dealt with the question of evidence necessary to hold officers of corporations in contempt, and those cases are analogous to the present situation. For example, the court in *Bigelow* v. *R.K.O. Radio Pictures*, 78 F.Supp. 250 (N.D. Ill. 1948) made the following observation:

> "Modern business practice requires that officers of large corporations delegate duties to, and rely upon, other officers and employees. When there is no evidence of bad faith; where the responsibility for compliance has been reposed upon another official or employee without any attempt to evade the obligation of compliance; and if the president of the corporation was not derelict in performing his direct or supervisory duties, the occupancy of an official position is not enough to demonstrate contemptuous participation." (78 F.Supp. at 258).



Therefore, when confronted with a contempt action pursuant to an NLRB order, the Circuit Courts have *required a finding that the officer charged with the contempt is actually responsible for the contemptuous conduct before adjudging such officer to be guilty.* (*NLRB* v. *Trans-Ocean Export Packing, Inc.*, 473 F.2d 612 (9th Cir. 1973); *NLRB* v. *My Store, Inc.*, 67 LRRM 2733 (7th Cir. 1968)). Absent a finding that Angle had expressly authorized or ratified any alleged improper conduct of Pesicka, the District of Columbia Circuit Court of Appeals erred in rejecting the law relied on by the Master and finding Angle in contempt for his plant superintendent's actions.

**2. The Order Below Requires Angle to Make Promises Under Oath in a Manner of the Medieval Practice of Recanting or Abjuration Contrary to the Rights Guaranteed to Him by the First Amendment to the United States Constitution.**

The District of Columbia Circuit Court of Appeals has ordered Angle to post and to mail to all current and former employees (since September 10, 1971), copies of the Contempt Adjudication and a notice in the form prescribed by the Board and signed by George A. Angle. (Appendix, p.A64). The notice prescribed by the Board in response to the court's order (Appendix, p.A70) not only compels Angle to promise to obey in the future the actions which the court has outlined in its Order, but also forces him to promise that he "will stop doing" cer-

tain acts for which he was not personally charged in the contempt proceeding. Angle submits that the Board's notice procedure as authorized by the District of Columbia Circuit Court violates his rights under the First Amendment to the United States Constitution.

The Board's notice procedure has become one of its favored affirmative reliefs promulgated under Section 10(c) of the National Labor Relations Act (29 U.S.C. 160(c)) in unfair labor practice cases. In such proceedings, the original purpose of the notice was to advise employees that their employer had been found guilty of certain unfair labor practices in order that the employees would feel safe and secure in the knowledge that their rights would be protected under law. The House Committee had envisioned the posting of "appropriate bulletins" and the Supreme Court accordingly approved the use of such notices (*NLRB* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 268 (1937)).

In practice, however, these notices become classic, although sophisticated, examples of the medieval practice of confessing and abjuring (recanting). Intellectually, the wording of the notices was superb. After stating that the employer had been found guilty, he was required to admit publicly in the notice that he would cease and desist from such unlawful activity, thereby indicating that the employer had in fact been guilty as charged. This subtle, yet powerful, forced confession was attacked in the courts. Following a somewhat checkered career, the practice was halted by Justice Learned Hand, in the case of *Arts Metal Construction Co.* v. *NLRB*, 110 F.2d 148 (2d Cir. 1940), in which he stated:

> ". . .; we can very well understand the sincere outrage which anyone may feel at being forced publicly to declare that he has committed even a minor dere-



> liction of which in his heart he does not believe himself guilty." (110 F.2d at 151).

It is extremely important to note that Justice Hand's decision came immediately after the Supreme Court had expressly approved the use of such notices in the case of *NLRB* v. *Falk Corp.*, 308 U.S. 453 (1940).

Despite the Supreme Court's approval, Justice Hand reasoned that the High Court had *not* passed upon the "confession" question. Accordingly, he denounced and refused to enforce the "cease and desist" language sought by the Board. The NLRB acquiesced in Hand's conclusion, despite the early approval of such "notice" language by the Supreme Court, and the Board stopped this improper practice. (*NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 439 (1941)). However, *the companion practice of abjuration was not questioned nor set aside. We now ask the Court to do so.*

Abjuration has been variously defined as (1) to disclaim formally or renounce upon oath; (2) to abstain from; (3) a firm, final rejecting or abandoning made with measured conviction and often signalized by oath or other formality. (See, Webster's *Third New International Dictionary*, Unabridged). The form prepared by the Board in the instant case is obviously such a formality. It is carefully drafted and prepared by the Board. Angle, by the court's order, is forced to sign the Board's notice and formally post it and mail a copy of said notice to current and former employees. While the notice is couched in layman terms of "I will fully comply," "I will reimburse," and "I will stop," it is nonetheless *a solemn oath* being required by the government to be made publicly to the employees.

Forced confession and abjuration (recanting) reached their peak during the Medieval Inquisition. Forced confession usually took place in the "private chambers" provided for such purposes. After the confession had been obtained, a highly-ceremonial procedure took place in the open and before the masses, in which the confession was read in "vulgar" language and acknowledged by the accused, who then publicly abjured and promised to be faithful in the future. "Enforcement" was then handled by the secular arm of the State.

Henry Charles Lea, in his Three-Volume work, *A History of Inquisition of the Middle Ages* (1955), traces the pattern of such public confessions and abjurations, as follows:

> "With time this *ceremony* grew in stateliness and impressiveness. Sunday became prescribed for it, and as no other sermons were allowed on that day in the City, it was forbidden to be held on Quadragesima or Advent Sunday, or any other of the principal feast days. *Notice* was given in advance from all the pulpits summoning all the people to be present and obtain the indulgence of 40 days. A *staging* was erected in the centre of the church, on which the 'penitents' were placed, surrounded by the secular and clerical officials. The sermon was delivered by the inquisitor, after which the *oath of obedience* was administered to the representatives of the civil power, and a solemn decree of excommunication was fulminated against all who should in any manner impede the operations of the Holy Office. Then the notary commenced reading the confessions one by one in the *vulgar* tongue, and as each was finished, the culprit was asked if he acknowledged it to be true—care being taken, however, only to do this when he was known to be truly penitent



> and not likely to create scandal by a denial. On his replying in the *affirmative* he was asked whether he would repent, or lose body and soul by persevering in heresy; and on his expressing a desire to abjure, the *form of abjuration* was read and he repeated it, sentence by sentence. Then the inquisitor absolved him from the *ipso facto* excommunication which he had incurred by heresy, and promised him mercy if he behaved well under the sentence about to be imposed.
>
> . . .
>
> "We can readily picture to ourselves the effect produced on the popular mind by these awful celebrations, when, at the bidding of the Inquisition, *all that was great and powerful in the land was called together humbly to take the oath of obedience and witness its exercise of the highest expression of human authority, regulating the destinies of fellow-creatures here and hereafter.*" (1 Lea, *supra,* at page 392). [Emphasis added].

It takes little imagination to substitute the modern-day Board notice in the instant case written in layman language, complete with promise and publication, for the purpose of extracting a forced promise from Angle through enforcement proceedings which threaten fine or imprisonment if he will not sign the oath. (See also, Coulton, *Inquisition and Liberty,* (1929); Roth, *The Spanish Inquisition,* (1964); Tuberville, *Mediaeval Heresy and the Inquisition* (1964)).

The Board's notice procedure has met with varied results before the Circuit Courts of Appeal in which said procedure has been presented. The Second Circuit Court of Appeals in *J.P. Stevens & Co.* v. *NLRB,* 380 F.2d 292

(1967), while not recognizing the constitutional problems involved, nor the ancient doctrine of abjuration, found itself uncomfortably aware of the humiliation which the Board was seeking to impose upon the company, and it is obvious from a reading of the case that the position being taken by the Board ran contrary to the natural sense of law held by the Justices. The court concluded that there was an element of "some humiliation in having company officials personally and publicly participate" and force public readings of the notice and stated that:

> "Even posting a notice may be of some embarrassment to the company." (380 F.2d at 305).

The District of Columbia Circuit Court of Appeals, in ruling upon a similar request by the Board, refused to enforce the form of ceremony which the Board had designed, and stated:

> "We recognize the broad scope of discretion Congress has given the Board in fashioning remedies, however, *that discretion is not without limits.* . . . The public reading by the employer of the order would, further, be *humiliating and degrading to the employer* and undoubtedly would have a lingering effect on future relations between the company and the Union. It could as well have an impact on the atmosphere, not only at the time of the reading, but in the future, for peaceful, fruitful and effective labor bargaining. It is conceivable that some conduct on the part of an employer or a union might reach such extreme dimensions as to justify the novel and drastic step of requiring the offending party to stand up before the employees and read the Board's notice publicly, but we cannot close our eyes to the reality that such a course would inevitably poison the future relations between company and union and be a source of continuing resentment. *The ignominy of a forced public reading and a 'confession of sins' by any employer, any employee, or any union representative, makes such a remedy incompatible with the democratic principles of the dignity of man."* (*I.U.E.* v. *NLRB*, 383 F.2d 230, 233-234 (D.C. Cir. 1966). [Emphasis added].



While there may be some difference in degree between personally *signing* such a public promise to obey and personally *reading* such a prepared statement, the basic fabric of the abjuration remains and the result is the "confession of sins" described by the District of Columbia Circuit Court. All that is lacking is the face to face encounter. Availing an employer of the opportunity not to be present during his humiliation through the reading of the Board-prepared promise and recantation he has been forced to sign is of little value to men of strong character.

In reviewing notices promulgated by the Board, the Circuit Courts of Appeal have not hesitated to strike down notice language and procedures deemed to be offensive.[5]

The value of abjuration, of course, is only in proportion to the character of the person who abjures. In other words, the person to whom a promise is meaningless and whose actions, therefore, need control, will readily agree to sign; while the person who prizes his promise and would risk fine and imprisonment or, as history has shown, even death, rather than violate his word—and whose actions, therefore, probably need little control—must refuse

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[5]*See, NLRB* v. *Douglas & Lomason Co.*, 443 F.2d 291 (8th Cir. 1971); *Love Box Co.* v. *NLRB*, 422 F.2d 232 (10th Cir. 1970); *United Drop Forge Division* v. *NLRB*, 412 F.2d 108 (7th Cir. 1969); and *NLRB* v. *Laney & Duke Co.*, 369 F.2d 859 (5th Cir. 1966).

to sign, since he has no means of controlling the promise he is being required to make. In short, the abjuration principle requires an ethical, moral, or religious person with a strong sense of right and honesty if the abjuration principle is to be meaningful. Yet such a person cannot sign an oath that he and all others will not violate the law, even though unknowingly, since he has no means of controlling such a promise. The promisor cannot control what others will do. Neither can the promisor control whether a future court will rule his own conduct or that of other management members illegal, although unwittingly so.[6]

Signing such a promise would, therefore, subject promisors with religious scruples to punishment, not only before the courts, but also before their God, if the promise were later broken! This they cannot do. What, then, is the purpose of the ceremony which the court in the instant case is requiring?

Like all forms of abjuration, when stripped of their intellectual sophistry, they reveal an attempt by those in power to use raw governmental force to conform both the *acts and the thoughts* of their fellow men to the orthodoxy of the day. Justice Jackson, speaking for the United States Supreme Court, traces succinctly the history of those who attempt to coerce others to utter aloud that which the government wishes to hear, as he states:

> "Ultimate futility of such attempts to compel coercion is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of

[6]*See, Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966).



> our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> . . .
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*" (*West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1942)). [Emphasis added].

An order that any individual must promise to keep the law as a price he must pay to avoid contempt is abhorrent to our American system of law. It is doubly abhorrent for a court then to order the employer to promise that he "will stop doing" certain acts of which he has been ordered to refrain. Such medieval logic is incomprehensible in 20th Century America.

The Circuit Court of Appeals, in the instant case, is seeking to force Angle to make a public promise concerning not only his own conduct, but the conduct of other members of the Company and to penalize Angle not for his conduct alone, but also for the conduct of others who may violate the law, even though unknowingly to Angle. The court's order further imposes a penalty on Angle even should he believe it would be improper to make such a promise which he obviously cannot control. This result is reached because the court has ordered Angle to promise that he "will stop doing" virtually all of the instances of interference, restraint, and coercion which the Board alleged was purportedly engaged in by Al Pesicka, the plant superintendent. Despite the Special

Master's finding that these instances did not constitute contempt on the part of Angle and that Angle personally repudiated some of the statements allegedly made by Pesicka, the Circuit Court, based on a third-hand record, has ordered Angle to make promises as to actions which he personally has not been charged in contempt and promises which he cannot make come to pass.

Justice Black, speaking in another "oath" case, by which the government sought to extract a promise from its citizens, emphasized the unconstitutionality of penalizing a person for beliefs rather than conduct, and also the unconstitutionality of penalizing one for the conduct of others, as he stated:

> "These experiences underline the wisdom of a basic constitutional precept that penalties should be imposed only for a person's own conduct, not for his beliefs or for the conduct of others with whom he may associate." (*American Communications Assn.* v. *Douds*, 339 U.S. 382, 452 (1950)).

The United States Supreme Court followed the *Douds* decision by striking down an Oklahoma loyalty oath for public teachers and university staff members in *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), wherein it stated:

> "Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. . . . Indiscriminate classification of innocent with knowing activity *must fall as an assertion of arbitrary power.*" (344 U.S. at 191). [Emphasis added].

Freedom of speech cannot be upheld if we are commanded to sign promises on forms prepared by others.



A right to avoid cruel and unusual punishment cannot be upheld if we must publicly debase ourselves through forced promises and their publication under threat of fine or imprisonment.

Finally, it must not be forgotten that all authority was not passed to the Government of the United States by our Constitution but that the people reserved to themselves all those rights except as expressly granted to the government. Nowhere is there any grant of authority which would vest in any governmental agency the right to force an individual to make a promise and publicly post the same, especially when such a promise is one concerning the conduct of others which he cannot control and for whose alleged improper actions he has not been charged.

As the Supreme Court stated emphatically in another case involving labor relations matters:

> "The reason our Constitution endowed individuals with freedom to think and speak and advocate was to free people from the blighting effect of either a partial or a complete governmental monopoly of ideas. Labor unions have been peculiar beneficiaries of that solitary constitutional principle, and lawyers, I think are charged with a peculiar responsibility to preserve and protect this principle of constitutional freedom, even for themselves. *A violation of it, however small, is, in my judgment, prohibited by the First Amendment and should be stopped dead in its tracks on its first appearance.*" (*International Machinists* v. *Street*, 376 U.S. 740, 796 (1960)). [Emphasis added].

We, too, are concerned with freedom of speech under the First Amendment and with all other constitutional rights as well. *We urge the Court, therefore, in the strongest*

*manner possible, to protect the Petitioner, as well as us all, by putting an end to the practice of the lower court and the National Labor Relations Board in resurrecting the medieval abjuration and imposing it upon modern-day American law.*

### 3. The Order Below Is in Error and Requires Angle to Bargain Into Infinity Contrary to Circuit Court and Supreme Court Decisions and Policy of the National Labor Relations Act.

The District of Columbia Circuit Court's order provides that Angle is to refrain from instituting changes in any term of employment without providing the Union with notice and a reasonable opportunity to bargain about such changes. (Appendix, p.A63). No time limit whatsoever is put on this obligation. The court's open-ended bargaining order and imposition of a compliance fine and possible imprisonment, should he fail to comply with the order, leaves Angle with no choice but to act at his own peril should he not bargain into infinity with the Union.

The court's order is directly in conflict with decisions of the United States Supreme Court and Circuit Courts of Appeal interpreting the bargaining duty imposed upon an employer which recognize that, under established Board precedent, a certified union, upon the expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. (*Brooks* v. *NLRB*, 348 U.S. 96 (1954); *Star Mfg. Co.* v. *NLRB*, 536 F.2d 1192 (7th Cir. 1976)). To rebut this presumption, the employer can either establish that the union has in fact lost its majority, or that the company,



in good faith, has reasonable grounds to believe that the union has lost the support of a majority of the employees.[7]

*Moreover, there is no precedent whatsoever to support an order "locking" employees into representation by a union ad infinitum, regardless of their current desires. Indeed, to attempt to do so is repugnant to the very foundation of the National Labor Relations Act.*

Decisions of various Circuit Courts of Appeal have also held that when there has been a long lapse of time since the union's last certification, a decree granting enforcement must carry certain provisions to the effect that the employer, while obligated to bargain with the union, has the right to have determined by an election or other satisfactory method whether in fact the union is still the majority representative of the employees in the bargaining unit.[8]

In the instant case, however, although the Circuit Court recognizes that ten years have passed since the charges of unfair labor practice were first made against Kansas Refined Helium (Appendix, p.A62), the court's order in essence, not only requires Angle to bargain into infinity contrary to the above-cited cases, but also ignores the impact of the long lapse of time upon the Union's majority representative status and the desires of current employees. As a consequence, the court's bargaining order is

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[7] *Automated Business Systems* v. *N.L.R.B.*, 497 F.2d 262 (6th Cir. 1974); *Bally Case & Cooler, Inc. of Delaware* v. *N.L.R.B.*, 416 F.2d 902 (6th Cir. 1969) *cert. den.* 399 U.S. 910 (1970); *Terrell Machine Co.* v. *N.L.R.B.*, 427 F.2d 1088 (4th Cir.) *cert. den.* 398 U.S. 929 (1970); *Lodges 1747 and 743, International Assoc. of Machinists and Aerospace Workers, AFL-CIO* v. *N.L.R.B.*, 416 F.2d 809 (D.C. Cir. 1969) *cert. den.* 396 U.S. 1058 (1970).

[8] *N.L.R.B.* v. *Adhesive Products Corp.*, 281 F.2d 89 (2nd Cir. 1960); *N.L.R.B.* v. *Atlanta Journal Co., d/b/a Radio Station WSB*, 187 F.2d 13 (5th Cir. 1951).

in direct conflict with prevailing case law and the policy of the National Labor Relations Act interpreting the scope of an employer's bargaining duty.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,295
23,300

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,
Intervenor

Nos. 23,750
23,751

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

### REPORT OF SPECIAL MASTER

(Issued March 11, 1975)

## RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In compliance with the Court's Order entered January 12, 1973, the Special Master submits the following Report and Recommended Findings of Fact and Conclusions of Law.

Submitted with this report are the transcripts of pre-trial conferences held September 28, 1973 and October 25, 1973 and the transcripts of the proceedings and evidence introduced at hearings before the Master had on November 13, 14, 15, 19, 20 and 21, 1973, and on January 14, 15 and 16, 1974, together with all exhibits received in evidence and the proposed findings and conclusions and the briefs submitted by counsel.

Upon the entire record I make the following

### RECOMMENDED FINDINGS OF FACT

1. On or about July 11, 1972, the National Labor Relations Board moved the Court for an adjudication that George A. Angle, doing business as Kansas Refined Helium Company (hereinafter "Angle" or "the Company" or "KRH"), by various acts, had committed a contempt of the Court's judgment issued on September 10, 1971 (opinion reported at 144 U.S. App. D.C. 167, 445 F.2d 237, cert. denied, 404 U.S. 1039 (January 17, 1972), enforcing two orders of the National Labor Relations Board issued on June 25, 1969 (reported at 176 NLRB Nos. 115 and 116)). The Board's order in 176 NLRB No. 115, as enforced by the Court's judgment (hereinafter "Court Order No. 1"), directed Angle, his agents, successors and assigns to:



Cease and desist from:

(a) Coercively interrogating his employees concerning their adherence to, or activities on behalf of Oil, Chemical and Atomic Workers International Union, AFL-CIO (hereinafter "the Union"), or any other labor organization, or concerning such adherence or activities of any other employee; threatening to discharge employees for union adherence or activities; threatening to close his helium plant because of employees' union activities; discharging employees for concertedly requesting that plant working conditions be reduced to writing; or granting wage increases to discourage employees from adherence to, or activities on behalf of, any labor organization . . .

(b) Discriminating in regard to tenure of employment or any term or condition of employment against any employee to discourage membership in, adherence to, or activities on behalf of, the aforesaid labor organization or any other labor organization.

[(c)] Refusing to bargain collectively with [the Union] as the representative of his employees in [a specified appropriate unit].

[(d)] Changing the terms and conditions of employment of the employees in said unit without bargaining concerning such changes with the said Union . . .

Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to . . . Arel Rodgers . . . immediate and full reinstatement to [his] former or substantially equivalent position . . . without prejudice to [his] seniority and other rights and privileges and make [him] whole for any loss of pay [he] may have suffered by reason of the discrimination against [him] . . .

[(b)] Upon request, recognize and bargain collectively with [the Union] as the exclusive representative of the employees in [the unit found appropriate].

The Board's decision in 176 NLRB No. 116, also enforced by the same judgment of the Court as 176 NLRB No. 115 (hereinafter "Court Order No. 2") ordered his agents, successors and assigns to:

Cease and desist from:

(a) Discouraging membership in [the Union], or any other labor organization, by suspending employees or by discriminating against employees in any other manner in regard to hire, tenure or any other term or condition of employment.

(b) Discharging or in any other manner discriminating against employees because they have given testimony in a proceeding under the Act.

(c) In any other manner, interfering with, restraining, or coercing [his] employees in the exercise of their rights of self organization, to form, join or assist [the Union], or any other labor organization, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

Take the following affirmative action which . . . will effectuate the purpose of the Act:

(a) Offer to Arel Rodgers immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of [Angle's] discrimination against him. . .



2. On or about August 16, 1972 the Board filed with this Court a motion for temporary relief, with supporting affidavits, requesting the reinstatement of discharged employees Hilary Luft and Arel Rodgers pending disposition of the contempt proceedings. That motion was granted by the Court on September 12, 1972. The Court's Order granting the Board's motion (hereinafter "Court Order No. 3") required that:

[1] . . . the indefinite suspensions or discharges of Arel Rodgers and Hilary Luft be withdrawn and rescinded and that they immediately be returned to pay status at their former positions of employment, without prejudice to their seniority and other rights and privileges and . . . that

[2] . . . [Angle] and his agents, shall take no further punitive action, including suspension, discharge or other sanctions against Rodgers and Luft on account of their membership in, or support of, or activities on behalf of [the Union].

On or about January 15, 1973, the Board filed with this Court a motion for further temporary relief, with supporting affidavits, requesting the reinstatement of discharged employees Brian Brack and Harold Straub pending disposition of these proceedings. The Court granted the Board's motion on February 14, 1973. The Court's February 14 order (hereinafter "Court Order No. 4") provided that:

[1] . . . the indefinite suspensions or discharges of Brian Brack and Harold Straus [sic] be withdrawn and rescinded and that they immediately be returned to pay status at their former positions of employment, without prejudice to their seniority and other rights and privileges and . . . that

[2] . . . [Angle] and his agents, shall take no further punitive actions, including suspension, discharge or other sanctions against Brack and Straus [sic] on account of their membership in, or support of, or activities on behalf of [the Union].

3. The Board's Fourth Amended Petition for Adjudication in Civil Contempt, filed with the Court on or about July 20, 1973, alleged that Angle and Al Pesicka, his plant superintendent, had violated the Court's judgment by engaging in various acts of interference, restraint and coercion of its employees, by discharging and failing to properly reinstate four employees (Arel Rodgers, Hilary Luft, Brian Brack and Harold Straub), and by implementing certain changes in employees' working conditions without affording the Union adequate notice and a reasonable opportunity to bargain about such changes. Respondent's answer denied that it had engaged in contumacious conduct and raised certain affirmative defenses. On January 12, 1973, the undersigned, Senior Judge, United States District Court, District of Kansas, was designated Special Master by the Court to hear evidence and make recommended findings of fact and conclusions of law.

4. While in its Amended Petition the Board sought to impose sanctions against Pesicka, including a request that he be found in contempt, pay fines and purge himself of contempt by engaging in certain conduct, Pesicka was never served with a summons or other process in this proceeding or afforded notice of discover proceedings. He was not represented by counsel at any hearing before the Master.

5. At the pre-trial conference counsel entered into stipulations of fact and at the commencement of the evidentiary hearing it was agreed among counsel that the transcript of the pre-trial conference, held October 25,



1973, should serve as the pre-trial order, and that the issues, with the exception of the sixth stated issue were:

1. "Was Rodgers properly reinstated and retained in employment in accordance with the [orders of the] Court of Appeals, D. C. Circuit?" Tp. 20.

2. "Were the discharges of the following employees in violation of the orders of the Court of Appeals: A. Hilary Luft; B. Arel Rodgers; C. Brian Brack; D. Harold Straub?" Tp. 20.

3. "Were the temporary reinstatements of the following employees in accordance with the orders of the Court of Appeals, D. C. Circuit [Hilary Luft; Arel Rodgers; Brian Brack; Harold Straub]?" Tp. 20-21.

4. "Were the following employees constructively discharged by the Respondent: A. Hilary Luf; B. Arel Rodgers?" Tp. 21-22.

5. "Has the Respondent improperly interfered with employees' rights protected under Sections 8(a)(1), (3) and (5) of the NLRA in violation of the order,' orders, of the Court of Appeals, D. C. Circuit?" Tp. 23.

6. "Did the NLRB, the Union or Arel Rodgers, or any combination thereof, interfere with, or impede Respondent's efforts to comply with the Court Order?" Tp. 24. [The Board's position with respect to the Sixth issue tendered by the Respondent was that it is not properly an issue in this case. The Master ruled that evidence would be received on the Sixth issue, the Board to have a continuing objection to its admissibility.] The recommended findings and conclusions of the Master are made in the light of the issues as limited by the Pretrial Order.

6. Angle, a sole proprietor doing business as Kansas Refined Helium Company, owns and operates a plant near

Otis, Kansas, which produces liquified helium and other components extracted from natural gas. The extraction process is accomplished through the use of sophisticated and complex equipment, specially designed, built, and installed for the purpose. Natural gas received at the plant passes through many compressors interconnected by an intricate system of piping, by means of which various components are separated at different levels of extremely low temperatures. The plant is almost completely automated and the pressures and temperatures on a great number of gauges are reflected on a large control panel which must be constantly monitored by controllers to the end that the processes not be interrupted and that temperature and pressures at no point in the system reach a dangerous stage. In addition to the information shown on the control panel, employees known as "rovers" record the gauge readings as obtained by visual inspection.

7. It was stipulated by the parties that (A) Arel Rodgers returned to work at KRH on March 23, 1972. He was discharged by Angle on July 12, 1972 and was temporarily reinstated on September 30, 1972 by order of this court. On May 22, 1973, he terminated his employment at KRH; (B) Hilary Luft was suspended on July 11, 1972, was discharged by Angle on July 12, 1972, and on September 29, 1972 was temporarily reinstated by order of this court; on May 22, 1973 he terminated his employment at KRH; (C) On August 17, 1972 Brian Brack was discharged by Angle and on March 2, 1973 he was temporarily reinstated by order of this court; (D) On March 2, 1973 Harold Straub was temporarily reinstated by order of this court (Tp. 14-15). [The Board did not stipulate that the "temporary reinstatement" of any of these employees constituted proper reinstatement pursuant to the court's orders.]



8. The Board on the one side and Angle on the other have compiled a long history of litigation revolving around the recognition of a union by Angle. Throughout the continuing controversy Angle and Rodgers have been the real protaganists. Each has acquired an intense and unconcealed personal dislike for the other.

9. Angle is a strong-minded individual who, although he has other interests than the KRH plant, maintains close personal supervision over it. It is inconceivable that any of the actions of Pesicka were taken without authorization by Angle. I therefore find that Angle was responsible for all of Pesicka's acts here in issue except as I expressly otherwise find, and that with such exceptions, such acts were authorized or directed by Angle.

10. At the time of the hearing before the Master back-pay claims by Angle's employees were pending in an independent proceeding and are not here involved.

## FIRST ISSUE—RODGERS

11. ["Was Rodgers properly reinstated and retained in employment in accordance with the [orders of the] Court of Appeals, D. C. Circuit?"]

A. During Rodgers' earlier employment at KRH and at the time of his discharge, the plant's operations were conducted by one "senior operator" and two "junior operators" on each shift, with no other on-site supervision. Rodgers' position was described as "senior operator" and his pay was $3.75 per hour. Angle maintained before the Board that Rodgers was a supervisory employee within the meaning of the Act. On the basis of Rodgers' testimony that he exercised no supervisory functions, the Board, sustained by this court, decided that Rodgers was not a supervisory employee.

B. During Rodgers' first period of employment it was Angle's belief that the "senior operators", including Rodgers, were supervisors and he looked to each of them, while on duty, to supervise the work of the other employees on his shift. After the decision that the "senior operators" were not supervisors, Angle, in order to provide constant supervision of the plant and its operations, tried various organization plans culminating in the one in effect at the time that Rodgers was reinstated. Under this plan, the plant superintendent was in charge of all operations and an "Operations Manager" was in charge of each shift, four in all. (Other supervisory positions were designated as managers of maintenance, instruments, office and inventory). The superintendent and all managers exercised supervisory functions. The superintendent and the managers together constituted a supervisory level above the positions theretofore labeled "Senior Operators" and these positions, previously designated as "Senior Operators", became "Chief Operators". At the nonsupervisory level in plant operations there was a "Chief Operator" on each shift, together with three or four other plant employees. The highest non-supervisory position in the organization was that of Chief Operator and, when Rodgers was reinstated it was to that position. The hourly wage for that position being $3.70 per hour.

C. Rodgers had not worked at the plant for several years prior to his reinstatement on March 23, 1972 and he was assigned as an extra man on a shift to receive on-the-job retraining with instructions from Angle to the supervisory employees that Rodgers be supplied all information requested by him. No information requested by him was withheld. He performed all of the tasks performed by other employees of the same job description, except that of starting a new liquifier, something rarely done. Rodgers made no complaint to Angle or to any supervisor of this omission.



D. Before Rodgers' reinstatement, Angle directed a letter to him (Board's Exhibit 6) in which he recounted the history of the entire controversy to that time, expressed his opinion of Rodgers, and stated the conditions under which Rodgers was to be reemployed. In another letter to Rodgers (Board's Exhibit 11) Angle outlined the duties that would be expected of Rodgers as an employee. Both letters were posted on the bulletin board at the plant. Angle's purpose in writing the letters admittedly was to attempt to dissuade Rodgers from accepting reinstatement (Tp. 209).

E. On the date of Rodgers' reinstatement, Angle assembled all of the employees of KRH and made a speech in which he stressed the right of the supervisors to discharge unsatisfactory employees; gave examples of bad attitudes on the part of employees; and cited acts and behavior which he said had been displayed by Rodgers during his earlier employment, i.e. spying on other employees, taking notes while on duty, etc. He specifically directed Rodgers not to enter the plant premises while off duty and to take no notes or take telephone calls on company time (Tp. 707). Angle stated that the only reason Rodgers was reemployed was because the law required such action. The tone of his speech was harsh and intemperate and he made no secret of his dislike for Rodgers.

F. Angle's personal aversion to Rodgers stemmed from his conviction that Rodgers, in proceedings before the Board, had testified falsely that as "Senior Operator" he had never performed supervisory functions. This belief is stated in his letter to Rodgers dated March 8, 1972 (Board Exhibit 6).

G. At Angle's direction the supervisory employees submitted weekly written reports evaluating Rodgers' progress in retraining. Similar reports were made on all

new or reinstated employees. Angle did not direct or encourage the submission of adverse reports on Rodgers' work. On May 1, 1972 and again on May 24, 1972 Angle addressed to Rodgers letters stating his dissatisfaction with Rodgers' work and posted both letters on the plant bulletin board (Board Exhibits 21 and 22). The letter of May 24th ended with the statement, "Rodgers, this is what this notice is telling you. You must display more interest and effort, both to your supervisors and other employees, and act like you want to be an employee as required by an employer or you will be discharged. I do not know how I could say it any plainer."

H. Angle was disappointed in the outcome of the litigation and was not happy with the order of this court directing Rodgers' reinstatement. Before reinstating Rodgers he attempted by his letters and by his speech to the plant employees to dissuade Rodgers from accepting reinstatement. Nevertheless, having failed to discourage Rodgers, he did reinstate Rodgers to the highest non-supervisory position and at the same wage paid other employees holding the same position.

I. Rodgers, after his reinstatement, as during earlier periods of employment, was intent on accumulating evidence indicating noncompliance by Angle with the law and with the court's orders. He was hypersensitive and suspicious and complained constantly of inconsequential and imagined slights. In his testimony before the Master, he displayed almost perfect recollection of events on direct examination, but on cross-examination was equivocal and frequently claimed inability to remember acts and events unfavorable to his contentions. His testimony in many respects was not supported by other evidence and was not completely credible.



J. Rodgers was not discriminated against after his return to work in 1972 and if he had made a reasonable effort to perform his duties as an employee in the manner properly expected of him and other employees, he would have been retained as an employee without discrimination as to pay or position.

K. Rodgers was properly reinstated in employment in accordance with the orders of this court.

SECOND ISSUE

12. ["Were the discharges of the following employees in violation of the orders of the Court of Appeals: A. Hilary Luft; B. Arel Rodgers; C. Brian Brack; D. Harold Straub?"]

A. On July 11, 1972 Hilary Luft was involved in an altercation with one Wagner, a fellow employee, on company premises and on company time. Angle suspended both men and arranged for Pesicka to hold a conference with them on July 12, 1972, for the purpose of reinstating them with a warning of dismissal if there should be fighting on company time. Luft was advised by Pesicka of his reinstatement before the conference. Rodgers, without any request from Luft, and having knowledge that Luft was to be reinstated, persuaded Luft to insist that at the conference Luft be represented by Rodgers, acting as a union steward or union representative. At that time there was no contract with the union and no grievance procedures had been established. Neither Angle or Pesicka had any notice of any claim by Rodgers or by anyone that Rodgers was a union steward. Luft and Rodgers appeared together at the KRH office on July 12th and insisted on Rodgers' attendance at the conference, to the point of a physical struggle between Rodgers and Wagner. Both Luft and Rodgers were discharged for insubordination.

B. Luft and Rodgers unreasonably insisted upon Rodgers' attendance at the conference since both knew that no further disciplinary action was contemplated. Their conduct warranted their discharge.

C. On August 14, 1972 (although the testimony as to the date is conflicting, I find the date to be August 14, 1972) Brack was assigned the duty of taking and recording the reading of the gauges on the various compressors at the plant, the readings to be taken hourly. This duty was vitally important to the safe and efficient operation of the plant. For one period of at least two hours Brack remained continuously in the control room and for another period of at least one-half hour he remained continuously in the maintenance shop. No compressors were located in either the control room or the maintenance shop.

D. Pesicka reported to Angle Brack's non-attention to duties. Angle investigated, believed the report to be true, and discharged Brack for nonperformance of assigned duties.

E. Brack's discharge was justified and proper.

F. On November 16, 1972, Straub informed Pesicka that he had been advised by a physician that he should change jobs for health reasons. Pesicka reported the statement to Angle, who undertook an investigation by writing letters to Straub and to two physicians known by him to have treated Straub in the past. Straub did not respond to Angle's inquiries and the responses of the two physicians were to the effect that neither had advised Straub to change jobs.

G. Straub did not testify before the Master but in a deposition taken in this proceeding and received in evidence, he admitted that the statement he had made to Pesicka on November 16, 1972 to the effect that he had



received medical advice to change jobs was false. Straub knew that the letter from Angle, dated November 28, 1972, was precipitated by his statement to Pesicka but he took no steps to deny, correct or explain the false statement.

H. There is no evidence that Straub was coercively interrogated about union activities as alleged by the Board. Pesicka denied that he had warned Straub not to become involved in union negotiations, as alleged by the Board. Straub did not take the witness stand to contradict Pesicka's testimony and I find that Pesicka's uncontroverted testimony should be credited.

I. I find that Straub was terminated for failing to respond to legitimate requests for information by his employer; that he made an admittedly false statement which he took no steps to deny, correct or explain. His discharge was justified and proper.

J. The discharges of Luft, Rodgers, Brack and Straub were not in violation of the orders of this court.

## THIRD ISSUE

13. ["Were the temporary reinstatements of the following employees in accordance with the orders of the Court of Appeals, D. C. Circuit: Hilary Luft; Arel Rodgers; Brian Brack; Harold Straub?"] Tp. 20-21.

A. The orders of this court entered September 12, 1972 and February 14, 1973 (Court Orders No. 3 and 4) directed the temporary reinstatement of Luft, Rodgers, Brack and Straub to pay status at their former positions of employment, without prejudice to their seniority and other rights and privileges.

B. Luft, on September 29, 1972, was temporarily reinstated to the same job title, the same rate of pay and performed the same duties as before his discharge on July 12, 1972. Tp. 1187-88.

C. Rodgers, on September 30, 1972, was temporarily reinstated to the same job as before his discharge on July 12, 1972. Tp. 758. There is no evidence that Rodgers was not reinstated at the same rate of pay. He performed all the duties that were expected to be performed by one in his job classification. Tp. 1150-52.

D. There is no evidence that Brack was not reinstated to the same job title and rate of pay as before his discharge on August 17, 1972. At least as early as two months after his reinstatement on March 2, 1973, he was again performing his regular shift duties as he had before his discharge. Tp. 639-42.

E. There is no evidence that Straub was not temporarily reinstated on March 2, 1973 to his same job title at the same rate of pay as before his discharge. He performed the duties of chief operator after his temporary reinstatement. Tp. 1035.

F. Luft, Rodgers, Brack and Straub were reinstated by Angle to pay status at their former positions of employment, without prejudice to their seniority and other rights and privileges.

FOURTH ISSUE

14. ["Were the following employees constructively discharged by the respondent: A. Hilary Luft; B. Arel Rodgers?"]

A. Luft and Rodgers each received from Angle a letter referring to the reinstatement ordered by this court and asking that each give him the date that he would return to work so that he might be fitted into the plant's work schedule. After consulting with a union representative, each composed a letter advising Angle that he would report to work on September 20, 1972. Each letter pur-



posely was mailed to Angle at such time that it could not reach Angle until sometime during the day of September 20, 1972, or thereafter. Luft and Rodgers reported together at the plant at 7:00 AM on September 20, then knowing that their letters could not have been received. Not being immediately put to work, they reported to the union and to the Board that they had not been reinstated. Rodgers had followed the same procedure when reinstated in 1967. Tp. 1115.

B. Luft and Rodgers terminated their employment by letter, each dated May 22, 1973. In the letters the reason given for termination was stated in virtually the same words, ending with identical sentences; "I cannot continue to work under these conditions until you comply with the court's orders." I find that the letters were composed and mailed concertedly by Luft and Rodgers with the intent and for the purpose of attempting to create evidence supporting a claim that Angle had violated the orders of this court.

C. Between the dates of their reinstatement in September, 1972 and May 22, 1973, when both resigned, Luft and Rodgers consistently and deliberately followed a course of conduct designed to lure Angle into actions which they might report to the Board as evidence of Angle's noncompliance with the orders of this court.

D. Luft complained to the Board that he was kept under surveillance while on duty at the plant but the only instance he could remember with any particularity was an occasion when Bill Bittner, a Chief Operator, was watching him out of a bathroom window. Bittner was not a supervisor or part of management. Luft admitted that he had never complained to any supervisor or any member of management that Bittner or anyone else was spying on him. Tp. 1202.

E. The evidence does not support the charge that Luft was denied benefits granted other employees. After Luft's reinstatement in September, 1972, he was reinstated in the Group Health Insurance Plan as soon as possible. Any delay was caused by the terms of the insurance policy itself and beyond the control of Angle. Tp. 1069-72, 1413-15, 1465-66, Board Exhibits 90 and 94, Respondent's Exhibit JJ. Myers, the office manager at KRH, did not advise Luft at any time that Luft's insurance was in force. Tp. 1420.

F. Luft complained that he was not given his full ten days of vacation in 1973. The company prorated Luft's 1973 vacation pursuant to the terms of a letter from counsel for the Board (Respondent's Exhibit W) which approved such procedure. Tp. 1471-74.

G. After Rodgers was reinstated in September, 1972, reports were made to Angle on his progress during the first part of his reinstated employment, but similar reports were also made on other new or reinstated employees.

H. After Rodgers' reinstatement, Angle issued instructions to his supervisors that they were to correct Rodgers only with regard to the performance of his work duties. Angle also advised Pesicka that he did not care what any of the plant employees did while they were off duty, but that he expected them to perform their duties while at work. Rodgers brought union literature to the plant each day and discussed that literature with other employees and Angle issued instructions that Rodgers was not to be disciplined for so doing. Tp. 512-13, 159-60. Rodgers was not disciplined for bringing union literature to the plant and discussing it with other employees. Tp. 571, 171, 883.



I. Rodgers was not discriminatorily denied benefits granted other employees. Rodgers knew what had to be done to re-apply for group health insurance coverage after his reinstatement but failed to take the required action. Tp. 1410, 1416-20, Board Exhibits 86 and 87. When he did get his application blank to reapply for insurance, he did not follow the instructions for submitting his application. Tp. 1423, 1426, 1475, Respondent's Exhibit KK. The delay in Rodgers' insurance coverage after his reinstatement was required by the insurance carrier and beyond the control of Angle. Tp. 1465-66, Respondent's Exhibit JJ.

J. Rodgers first requested vacation time for "very personal reasons" in 1972 within two weeks after his reinstatement and after an absence of 5 1/2 years from the plant. Respondent's Exhibit A. Angle first granted the vacation to Rodgers and then withdrew permission when he became convinced that there were no "very personal reasons" for the requested vacation. Tp. 393-95. Rodgers made no further requests for vacations in 1972 and took none. Rodgers was not paid for vacation time not taken in 1972. Angle believed that the issue of vacation pay was a part of pending back pay litigation between the Board and Angle. Tp. 377-78, Tp. 1509. Angle's position on this issue was not taken in order to deny benefits to Rodgers, Angle admitting that some vacation pay was due and believing that the amount would be determined in the pending back pay litigation.

K. Rodgers' 1973 vacation pay was pro-rated on the basis of the number of days actually worked by Rodgers in 1972. Angle believed this action was proper and in accordance with a letter from the Board. Respondent's Exhibit W, Tp. 1471-73, Board Exhibit 80, Respondent's Exhibit U, V, W and X.

L. Luft and Rodgers voluntarily left Angle's employment on May 22, 1973. Neither was constructively discharged by Angle.

## FIFTH ISSUE

15. ["Has the respondent improperly interfered with employee's rights protected under Sections 8(a)(1), (3) and (5) of the NLRA in violation of the order, orders of the Court of Appeals, D. C. Circuit?"]

A. The Group Health Insurance Policy covering the KRH employees also covered all other employees of the various Angle companies, approximately 150 in all. It was economically beneficial to both Angle and the KRH employees to provide coverage through one large group insurance policy rather than through a separate policy covering only the KRH employees. Tp. 413-16, 1456-57, Board Exhibit 53, Respondent Exhibit P. The change in insurance coverage for the year 1972 was required by the insurance carrier and was not initiated by Angle. Tp. 1457-60; Board Exhibit 53; Respondent Exhibit L, M and N. Angle was attempting to maintain the same insurance coverage at the lowest possible premium rate and that made a change in insurance carriers advisable. Tp. 1458-59; Board Exhibit 53; Respondent Exhibit O.

B. Angle's reorganization of the job structure at the KRH plant was not in violation of the court's order. Reorganization was made necessary by the Board's decision that senior operators were not supervisors. Planning for reorganization began in April of 1971 and the various changes were accomplished prior to the time the court's order became effective.

C. Angle did not interfere with the union organization efforts of the KRH employees by surveillance of union



meetings. There is evidence that the plant superintendent, Pesicka, attended one union meeting and that Michaelis, a supervisor, attended another. Angle did not suggest, request or require that either attend the meetings. Tp. 463. Michaelis' attendance was at the invitation of one of the alleged discriminatees Brian Brack. Tp. 637-38.

D. With respect to statements by Angle, allegedly discouraging the exercise of the rights of employees under the National Labor Relations Act, I find:

(1) Angle made no statement that he would "rather go to jail than sign a union contract". There is some evidence that Pesicka told one of the employees that in his opinion Angle would rather go to jail than sign a union contract. Tp. 543-44. This was merely the expression of a personal opinion, not authorized or directed by Angle, and Angle specifically denied that this was his position when questioned as to Pesicka's statement by the same employee. Tp. 561-64.

(2) Angle made no threat "to close the plant if the union came in". There is evidence that Pesicka told one of the employees that Angle did not really need to operate the plant. Tp. 591-92. But there is no evidence that Angle himself made such a statement. In fact, Angle stated, in a conversation with one of the employees, that he would sign a union contract that was fair both to him and to his employees. Tp. 561-62.

(3) Angle made no statement that there would "be no raises until the trouble was settled".

(4) Angle did not make a statement to KRH employees that Rodgers would get no back pay.

(5) Angle did not tell KRH employees that the NLRB was tired of Rodgers and was about to drop proceedings involving his discharge of reinstatement.

(6) Angle did not state that he would never sign a Union contract.

(7) On February 16, 1972 Angle posted at the KRH plant the notice required by the Board and by the order of this Court indicating that he would cease and desist from the practices found to have been violative of the act. The notice (Board's Exhibit 50) included the statement, "I will not grant wage increases to discourage employees from adherence to, or activities in behalf of, the above Union, or any other labor organization—but nothing in the preliminary decision of the trial examiner requires that I rescind or cancel any wage increase or other benefits heretofore granted." In July, 1972 Angle underlined the words of that paragraph, *"I will not grant wage increases"* and added in the margin of the notice the handprinted words "U.S. Gov't NLRB has this court order. Angle can *not* give any KRH employee a raise in salary". Tp. 350. He left the notice with the marginal note posted at the plant up to the time of the hearing. His action in so doing was ill advised and not calculated to restore good relationship with his employees but, the sixty-day posting period having elapsed, was not violative of the Court's order.

(8) Angle's vacation policy was the same for all his employees, at the KRH plant as well as elsewhere, and there was no change in policy from 1965, when KRH became operational, to the time of the hearing. Under the policy the employees' vacation credit, ten days per year, was earned in one year and became vested on January 1 of the ensuing year. It was calculated on the basis of the proportion of the days actually worked to the days in the year. Relying upon a letter from Counsel for the Board (Respondent's Exhibit W) Angle computed



the vacation time due Rodgers and Luft on the basis of the time actually worked by each in the preceding calendar year. Tp. 1471. Rodgers and Luft were credited properly with the vacation time earned by each.

(9) Angle did not prohibit discussion of Union recognition by his employees during breaks from working time. Tp. 175. Rodgers was permitted to bring Union literature into the plant and discuss it with the employees. Tp. 883.

## SIXTH ISSUE

16. "Did the NLRB, the Union, or Arel Rodgers, or any combination thereof, interfere with, or impede respondent's efforts to comply with the Court order?"

A. Rodgers, during the entire period here involved, kept in close touch with representatives of the Union and of the Board. Both advised him as to the legal effect of Angle's communications with him and assisted him in the composition of his letters to Angle. Such advice and assistance was given on the basis of information supplied by Rodgers and was within the scope of the duties and responsibilities of such representatives. There is no evidence that Rodgers was induced or encouraged by such representatives to engage in any illegal or improper activities.

B. Rodgers, by his purposeful failure to obey reasonable instructions, and by a deliberate course of conduct calculated to make Angle's efforts to require him to perform duties properly expected of him as an employee appear to constitute noncompliance with the Court orders, did interfere with and impede Angle's efforts to comply with the Court's orders.

## RECOMMENDED CONCLUSIONS OF LAW

Pursuant to the order of reference the Special Master concludes as matters of law that:

1. This proceeding should be dismissed as to the respondent, Al Pesicka. (See Finding of Fact No. 4)

2. The issues requiring resolution are limited to those agreed upon at the pretrial conference as set forth in Finding of Fact No. 5.

3. The burden is upon the Board to produce clear and convincing evidence in support of its allegations of contumacious conduct by the respondent. *NLRB vs. Stevens & Co.*, 464 F.2d, 1326 (2nd Cir., 1972); Cert. denied 410 U.S. 926.

4. The Board has failed to show by clear and convincing evidence that the respondent, Angle, has violated, failed, or refused to comply with any of the orders of this Court.

Respectfully submitted,

(Signed) Arthur J. Stanley, Jr.
Special Master



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## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23,295
No. 23,300

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL, UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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No. 23,750
No. 23,751

GEORGE ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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On Exceptions to the Report of the Special Master

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Argued September 30, 1975

Decided June 7, 1976

*Peter Ames Eveleth*, Deputy Assistant General Counsel, National Labor Relations Board, with whom *Paul Elkind*, Assistant General Counsel for Contempt Litigation and *Stanley R. Zirkin*, Supervisory Attorney, Contempt Litigation, National Labor Relations Board, were on the brief, for the National Labor Relations Board.

*Robert Martin*, of the bar of the Supreme Court of Kansas, *pro hac vice* by special leave of court, for George A. Angle. *W. Stanley Churchill* was on the brief for George A. Angle.

Before McGOWAN and TAMM, *Circuit Judges* and BURNITA SHELTON MATTHEWS,* *United States Senior District Judge for the United States District Court for the District of Columbia.*

Opinion for the Court filed by *Circuit Judge* McGOWAN.

McGOWAN, *Circuit Judge*: This petition for an adjudication of civil contempt is the latest chapter in lengthy proceedings involving labor relations at the Kansas Refined Helium Company (KRH), a highly mechanized helium extraction plant located near Otis, Kansas, of which respondent Angle is the sole proprietor. Charges of unfair labor practices at KRH, first raised in 1966, resulted in issuance of a complaint by the General Counsel of petitioner National Labor Relations Board.[1]

On June 25, 1969, the Board found that unfair labor practices had been committed. 176 N.L.R.B. 1032 (1969). The Board also found that one of the six employees who had been reinstated pursuant to a district court order, *see* note 1 *supra*, was subsequently suspended and discharged

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(c).

[1]While those charges were pending, the Regional Director of the Board obtained from the United States District Court in Kansas an injunction under § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j) (1970), which directed, *inter alia*, the reinstatement of six discharged employees pending a decision by the Board. Sacks v. Angle, 55 CCH Lab. Cas. ¶ 11,865 (D. Kan. 1967). Doubts about the extent of compliance with that order led to civil and criminal contempt proceedings. The former were dismissed after the Tenth Circuit modified that part of the order dealing with temporary reinstatement, Angle v. Sacks, 382 F.2d 655, 661 (10th Cir. 1967); and the criminal matter was also ultimately dismissed.



in violation of the Act. 176 N.L.R.B. 1037 (1969). The Board's orders were granted enforcement in all respects by this court. *Oil, Chemical & Atomic Workers* v. *NLRB*, 445 F.2d 237 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

On July 12, 1972, the Board first petitioned this court to hold respondent in civil contempt. We appointed a Special Master pursuant to FED. R. CIV. P. 53 to hear evidence and make findings respecting the alleged contumacy. Twice during the pendency of the contempt proceedings we ordered Angle to rescind the suspension or discharge of employees.[2] The Master conducted lengthy hearings on the petition, as amended, and on March 14, 1975, issued a report with recommended findings of fact and conclusions of law, which found all allegations of contemptuous conduct to be without merit. The matter is before us on petitioner's exceptions to that report.

## I. PRELIMINARY ISSUES.

We confront two questions which are unrelated but which impinge upon our consideration of every allegation of contumacy. They are (1) what is the scope of review of findings by a Special Master, and (2) must an alleged contemnor have acted with wilfulness in order to be found in civil contempt.

### A. *Scope of Review.*

Under rule 53(e)(2) of the Federal Rules of Civil Procedure, a court must accept the findings of fact of a

[2]On September 12, 1972, this court granted the Board's motion for temporary relief and ordered that the suspensions or discharges of employees Arel Rodgers and Hilary Luft be withdrawn and that they be reinstated with full privileges. On February 14, 1973, this court granted the Board's motion seeking the identical relief in regard to the discharges of employees Brian Brack and Harold Straub.

master unless "clearly erroneous." This is the same standard as that governing appellate review of District Court findings of fact, *see* FED. R. CIV. P. 52(a); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL, § 2614, at 809-10 (1971).[3] The party excepting to the master's findings carries the burden of proving them to be clearly erroneous, *e.g., Case v. Morrisette,* 475 F.2d 1300, 1307 (D.C. Cir. 1973), and the court must uphold a finding, even if it is thought to go against the weight of the evidence, unless the error is clear, *e.g., Zenith Radio Corp. v. Hazeltine Rsch., Inc.,* 395 U.S. 100, 123 (1969); *United States v. National Ass'n of Real Estate Boards,* 339 U.S. 485, 495-96 (1950). At the same time, the mere fact that a finding is supported by substantial evidence does not prevent its being overturned if the reviewing court, with due regard for the master's opportunity to judge credibility, "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948); *accord, e.g., Zenith Radio Corp. v. Hazeltine Rsch. Inc., supra,* at 123 and cases cited; *W.R.B. Corp. v. Geer,* 313 F.2d 750 (5th Cir. 1963). In this circuit, the clearly erroneous standard applies even to findings based on documentary evidence or inferences from undisputed facts. *Case v. Morrisette, supra,* at 1307; *see* 9 C. WRIGHT & A. MILLER, *supra,* § 2587. However, a master's conclusions of law are entitled to no special deference from the reviewing court, and will be overturned

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[3]In considering the meaning of this standard, we are mindful of Judge Learned Hand's observation that

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945).



whenever they are believed to be erroneous.[4] *E.g., Case v. Morrisette, supra,* at 1308, and cases cited note 39.

While findings of fact need not be in any special form, they must disclose to the reviewing court the basis of the decision. *E.g., Russo v. Central School Dist. No. 1,* 469 F.2d 623, 628-29 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973); *Alpha Distributing Co. v. Jack Daniel Distillery,* 454 F.2d 442, 453 (9th Cir. 1972). Moreover, in the instant case there are some issues presented as to which the Master made no findings of fact. Many of these involve evidence not controverted in the record and not challenged by respondent in his brief. In considering such issues, we adhere to the rule announced in *Hurwitz v. Hurwitz,* 136 F.2d 796, 799 (D.C. Cir. 1943), that "[i]n cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case."

B. *Is Wilfulness Required?*

Respondent has suggested that good faith or lack of wilfulness prevents an adjudication of contempt, conceding that he could provide no authority for this novel propo-

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[4]The Board asserts in its brief at 31-32 that a master's inferences, deductions, and conclusions of law are entitled to no special weight, citing in support of that proposition D.M.W. Contract Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1946), *cert. denied,* 330 U.S. 839 (1947), as well as several cases in other circuits and a well-known treatise. As respects inferences and deductions from even undisputed facts, *D.W.R. Contracting Co.* provides no, and the other authorities provide only tenuous, support for that assertion. Perhaps more important, the Board failed to cite more recent authority in both this circuit, *see* Case v. Morrisette, *supra,* at 1307, and the Supreme Court, *see* cases cited *id.* n. 34, that clearly take a contrary view of the "clearly erroneous" standard. We expect a more responsible attention to legal research, especially from a party seeking the extraordinary relief of a contempt adjudication.

sition, even as respects (1) alleged unilateral changes in wages, hours or conditions or (2) questions of Angle's liability in contempt for conduct of his subordinates, in which contexts the proposition was pressed most forcefully. We are not dealing here with criminal contempt. Nor are we dealing with the last stage in so-called three-stage civil contempt, consisting of (1) issuance of an order; (2) following disobedience of that order, issuance of a conditional order finding respondent in contempt and threatening to impose a specified penalty unless respondent purges himself of contempt by complying with prescribed purgation conditions; and (3) exaction of the threatened penalty if the purgation conditions are not fulfilled.

We are, rather, dealing with the second stage of this three-stage process, in which the court offers the respondent an opportunity to purge himself of contempt. In this context, the longstanding rule is that good faith or lack of wilfulness is not a defense that the petitioner must negate.[5] The rule is a salutary one, for the pur-

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[5]*See* McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949):

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of non-compliance. [Citations omitted]. Since the purpose is remedial, it matters not with what intent the defendants did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

*Accord, e.g.*, Screw Mach. Tool Co. v. Slater Tool & Engineering Corp., 480 F.2d 1042, 1044 (6th Cir. 1973); Hodgson v. A-1 Ambulance Serv., Inc., 455 F.2d 372, 374 (8th Cir. 1972); NLRB v. Fairview Hospital, 443 F.2d 1217, 1220 (7th Cir. 1971); Doe v. General Hospital, 434 F.2d 427, 431 (D.C. Cir. 1970); NLRB v. Ralph Printing & Lithographing Co., 433 F.2d 1058, 1062 (8th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971).



pose of a motion for civil contempt, at least at this second stage, "is not to punish intentional misconduct, but rather to enforce compliance with an order of the court and to remedy any harm inflicted on one party by the other party's failure to comply." *Doe v. General Hospital*, 434 F.2d 427, 431 (D.C. Cir. 1970).

## II. Alleged Violation Involving the Duty to Bargain.

We consider first the allegations that respondent unilaterally changed the terms and conditions of employment.

### A. *Alleged Unilateral Changes in Insurance Coverage.*

The Master's findings on this issue were, in their entirety, as follows:

> The Group Health Insurance Policy covering the KRH employees also covered all other employees of the various Angle companies, approximately 150 in all. It was economically beneficial to both Angle and the KRH employees to provide coverage through one large group insurance policy rather than through a separate policy covering only the KRH employees. Tp. 413-16, 1456-57, Board Exhibit 53, Respondent Exhibit P. The change in insurance coverage for the year 1972 was required by the insurance carrier and was not initiated by Angle. Tp. 1457-60; Board Exhibit 53; Respondent Exhibit L, M, and N. Angle was attempting to maintain the same insurance coverage at the lowest possible premium rate and that made a change in insurance carriers advisable. Tp. 1458-59; Board Exhibit 53; Respondent Exhibit O.

Master's Report at 20.

In its exceptions, the Board raises two principal objections to these findings. First, although not generally disputing the facts as found by the Master, it objects to the implicit legal conclusion that Angle's good faith justifies a failure to bargain.[6] We believe this exception must be sustained. The Master's findings on this issue appear to rest upon an erroneous conception of the law —that the employer's duty to bargain arises only when he is not acting in good faith—which we are duty-bound to correct. The applicable principle is stated in *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962):

> Clearly, the duty thus defined [by section 8(d)] may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact. . . .
>
> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment . . . and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5), without also finding the employer guilty of over-all subjective bad faith.

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[6]There is no dispute that no bargaining about the change took place. Nor can there be any question that insurance benefits and premiums are a mandatory subject of bargaining. *See* Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159 (1971), and cases cited note 1. Nor is this a case like Connecticut Light & Power Co. v. NLRB, 476 F.2d 1079 (2d Cir. 1973), involving a refusal to bargain merely about the identity of the carrier, for here the shift in carriers increased employee premiums by $4.20 a month for employees with dependents, *see* Petitioner's Exh. 53.



Thus it is clear that Angle's action was in contempt of the judgment of this court. We therefore decline to adopt the Master's findings and instead find the respondent in civil contempt for this failure to bargain.

The Board's second principal exception emphasizes the Master's failure to make *any* findings regarding a second change in insurance coverage, occurring at the end of 1972 with respect to the insurance policy effective during 1973. Uncontroverted documentary evidence indicates that this second change in insurance carriers effected many changes in coverage, *see* Petitioner's Exh. 54; *see also* Tr. at 1478-79, and increased the cost for single employees approximately $3.50 a month, *see* Petitioner's Exh. 55. It is undisputed that there was neither an offer by the company to bargain nor actual bargaining about these changes. Tr. at 377, 1478. Under the principle outlined above, there can be no doubt that this second unilateral change also violated the judgment of this court, and we accordingly find respondent in contempt in this respect.

B. *Alleged Unilateral Changes in Work Assignment.*

There is no question that sometime in 1971 or 1972, Angle, without any offer to bargain with the union, reorganized the job structure at KRH, creating new positions entitled "Operations Manager." The Operations Managers performed work that had been formerly performed by "Senior Operators," but they were also clearly given authority to be in charge of the operations on, and direct the members of, each shift, as well as to hire, discipline, assign, and discharge employees. Petitioner's Exh. 5. The new position of "Chief Operator" became the highest paying non-supervisory job.

There is no dispute between the parties concerning the effect of this reorganization. They agree that it created

a new supervisory position and transferred to it bargaining unit work; it also lowered the highest paying non-supervisory position from a minimum of $3.95 per hour—the lowest rate for Senior Operators—to $3.70 per hour—the new rate for Chief Operators. The controversy before us concerns when the change took place.

The Master found that

> Angle's reorganization of the job structure at the KRH plant was not in violation of the court's order. Reorganization was made necessary by the Board's decision that senior operators were not supervisors. Planning for reorganization began in April of 1971 and the various changes were accomplished prior to the time the court's order became effective.

Master's Report at 20.

Once again we are unable to adopt the Master's findings, for they appear implicitly to incorporate an erroneous view of the applicable legal standard. As we made clear in our original decision in this case enforcing the NLRB's orders,

> . . . what the statute requires [to support a claim of supervisory status] is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority. In NLRB v. Security Guard Serv., Inc., 384 F.2d 143, 149, the Fifth Circuit succinctly stated the essential point:
>
> > "* * * What is amiss with this argument which is based on paper credentials is that there is lack of actual authority to match. The concept of supervision has some elasticity, but it must have substance and not be evanescent * * * A supervisor may have potential powers, but theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers * * *"



445 F.2d at 243. The master's findings reflect no awareness that this standard governs what everyone concedes to be the critical question—was the job reorganization and consequent elimination of bargaining unit work effected before or after this court issued its mandate on September 10, 1971?

Viewing the record in the proper light, it is apparent that the Master's finding cannot stand. For neither the Master nor respondent points to sufficient evidence in the record to indicate that the job reorganization took place in practice, rather than on paper, before September 10, 1971. The evidence most closely connected with actual exercise of supervisory authority is a notice of April 29, 1971 from Angle to all KRH employees, which indicates that two members of the KRH maintenance staff were to be of equal status with the Senior Operators and were to work with the Senior Operators "to coordinate whatever is necessary to see that plant maintenance is accomplished," and that the two maintenance men were to conduct a training program in maintenance while two experienced operations men were to conduct a training program in operations. Petitioner's Exh. 13.[7] Although

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[7]The only other evidence we have found that at all supports the Master's finding is (1) Angle's testimony that office records would indicate that the term "Operations Manager" was first used on August 8, 1971, *see* Tr. at 105; (2) that in a letter of June 16, 1971 from Angle to his attorney, the term "Chief Operator" and the description "Manager in charge of plant operations" was used to describe four individuals who had been Senior Operators and later became Operations Managers, although Angle conceded in a letter that these titles were not in common use at

*(Footnote continued on following page)*

it seems uncertain that such powers, if exercised, could alone sustain a claim of supervisory authority, we need not speculate in this regard. For this notice by itself is a far cry from constituting "evidence of tangible examples demonstrating the existence of [supervisory] authority." There is simply not adequate evidence in the record to support the Master's finding that the vesting of supervisory authority, as defined by our earlier opinion, was accomplished before this court issued its mandate. Thus, we find Angle's unilateral elimination of bargaining unit work to be in contempt of this court's judgment.

### III. Alleged Coercive Activity.

Petitioner alleges that Angle or one of his subordinates on a number of occasions engaged in activity whose coercive effect on the free exercise of Section 7 rights violated this court's judgment.[8] We consider first the legal ques-

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Footnote Continued—

the plant, *see* Respondent's Exh. H; Tr. at 112, and (3) Angle's assertion that a letter or notice sent in April of 1971 made clear to the then Senior Operators that they had supervisory authority, Tr. at 200. Yet none of this evidence meets the standard set out in our earlier decision in this case.

It is instructive, moreover, to note—particularly as a qualification to item (3) above—that Angle conceded his doubt that there was any document informing the Senior Operators that they had become supervisors, Tr. at 200-01; that one employee testified that a notice of January 25, 1972, was the first indication to KRH personnel of the new supervisory positions, Petitioner's Exh. 5; Tr. at 581-83; and that another employee testified that Angle's attorney had stated at a bargaining session in February, 1972 that the post of Operations Manager had been created recently, about a month ago, Tr. at 1251.

[8]The Board's order in 176 N.L.R.B. 1032 (1969) directed Angle, his agents, successors and assigns, to cease and desist from

> (a) Coercively interrogating his employees concerning their adherence to, or activities on behalf of Oil, Chemical Atomic Workers International Union AFL-CIO (hereinafter "the Union"), or any other labor organization, or concern-

*(Footnote continued on following page)*



tion of Angle's responsibility for the acts of plant superintendent Al Pesicka, and then turn to individual incidents.

A. *Angle's Liability for Pesicka's Actions.*

The Master's report reaches inconsistent conclusions on the question of whether Angle was responsible for Pesicka's activities. At pp. 8-9, the Report states: "Angle is a strong-minded individual who, although he has other interests than the KRH plant, maintains close personal supervision over it. It is inconceivable that any of the actions of Pesicka were taken without authorization by Angle." But later, the Master indicates that three instances of allegedly coercive activity were undertaken not by Angle but by Pesicka without Angle's specific authorization, *see* p. 21, ¶¶ C, D(1), D(2), and the Master's complete exoneration of Angle appears implicitly to rest upon the view that Angle was not liable for Pesicka's actions.

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Footnote Continued—

> ing such adherence or activities of any other employee; threatening to discharge employees for union adherence or activities; threatening to close his helium plant because of employees' union activities; discharging employees for concertedly requesting that plant working conditions be reduced to writing; or granting wage increases to discourage employees from adherence to, or activities on behalf of, any labor organization . . . .
>
> (b) Discriminating in regard to tenure of employment or any term or condition of employment against any employee to discourage membership in, adherence to, or activities on behalf of, the aforesaid labor organization or any other labor organization.

The Board's order in 176 N.L.R.B. 1037 (1969) required Angle and his agents to cease and desist from

> (c) In any other manner, interfering with, restraining, or coercing [his] employees in the exercise of their rights of self-organization, to form, join or assist [the union], or any other labor organization, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

Although we believe a factual finding that Angle had not expressly authorized or ratified Pesicka's activity would be difficult to sustain, we need not reach this issue. For it is clear that, whatever the scope of Angle's express authorization or direction of Pesicka's activity, *as a matter of law* Angle is responsible. We long ago reiterated, in accordance with section 2(13) of the Act, 29 U.S.C. § 152(13) (1970), that strict principles of agency law do not apply in determining the liability of an employer, and proceeded to note that "we agree with the Board that an employer may properly be held responsible for 'interfering' in the affairs of a union because of participation by his supervisors even though such participation was not expressly authorized or ratified." *Local 636, Plumbers v. NLRB*, 287 F.2d 354, 359-60 (D.C. Cir. 1961), *citing International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940), and *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 521 (1941). Other courts, echoing this commonplace position, have indicated that the test of the employer's responsibility for acts of one of his supervisors is whether "'employees would have just cause to believe that he was acting for and on behalf of the company.'" *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 179 (2d Cir. 1965), *quoting NLRB v. Texas Ind. Oil Co.*, 232 F.2d 447, 450 (9th Cir. 1956).

Respondent has suggested that stricter rules govern an employer's liability in civil contempt, although he conceded at oral argument that he could provide no authority to support this suggestion. The proposition appears to us to be merely a variant of the broader contention that lack of wilfulness prevents an adjudication in civil contempt, a view we have already rejected. In the context before us, we derive guidance from *NLRB v. Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290, 293 (5th Cir. 1971), in which the court found an employer in civil contempt for conduct of a supervisor, even accepting as true the company's allegations that it took substantial steps to insure that its supervisory personnel would not violate the court's order and that the violations were committed by the lowest ranking supervisor at the plant, were not extensive, and were in violation of the instructions of the President of the company.



We need not decide whether we would go as far as the court in *Crown Laundry*. For here Pesicka was the highest ranking management official at the plant, Tr. at 92; Petitioner's Exh. 2; rather than repudiating Pesicka's authority, Angle had reaffirmed it, Petitioner's Exhs. 2, 13; and the evidence suggests that there was in fact authorization and ratification by Angle of Pesicka's activities, *see* Tr. at 293, 463-65, 511-12, rather than a direction to desist from such conduct. In these circumstances, there can be little doubt that employees would reasonably attribute the activities of Pesicka to Angle and that Angle never made a sufficient effort to ensure Pesicka's compliance with the Court's order.[9] We conclude, therefore, that insofar as the Master's Report exonerated Angle from

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[9]The correctness of this conclusion is easily seen when the instant case is compared to Amalgamated Clothing Workers v. NLRB, 371 F.2d 740 (D.C. Cir. 1966), where the court upheld an NLRB finding that an employer was liable for unfair labor practices committed by individuals who had no official connection with the employer in question. In that case, the business leaders of a small Southern town had induced the company's relocation in the town, subsidized labor surveys and advanced funds for construction of facilities on which the company had a right of refusal. The businessmen took an active interest in the success of the company and maintained a variety of informal contacts with both labor and management. The Board found the employer and the business leaders to have a community of interest, and took the company's silence about the leaders' anti-union activities as ratification thereof. *Id.* at 743-44. If the businessmen in that case may be taken as "organs of communication from management," *id.* at 744, there can be no doubt that Pesicka's actions were attributable to Angle.

liability for coercive activities of Pesicka, it rested upon an erroneous conception of law, and its findings cannot be adopted. Rather, in determining whether Angle is in contempt of this court's order, we are compelled to attribute to him declarations and conduct of Pesicka.

B. *Liability for Individual Incidents.*

*1. Pesicka's Attendance at a Union Meeting.*

The Master found that "[t]here is evidence that the plant superintendent, Pesicka, attended one union meeting," Master's Report at 21, an understated manner of summarizing the uncontroverted testimony on this point, *see* Tr. at 463, 1053-54. Respondent offers no reason for Pesicka's attendance but only the lame suggestion that Pesicka did not know that the meeting was exclusively for employees, *id.* at 463. The uncontroverted testimony of the results of his surveillance illustrates clearly why such surveillance has been held to constitute restraint and coercion of employees in the exercise of their Section 7 rights. An AFL-CIO representative asked Pesicka to leave after having been told of Pesicka's position and that employees were "dummying up" because of his presence. *Id.* at 1053-55. Pesicka left the hall but stayed on the grass nearby the building until the meeting ended, *id.*, and later reported to Angle the identity of those employees who had attended the meeting and what transpired, *id.* at 291-92, 463-64.

Where the only apparent purpose of such presence at a union meeting is to keep an eye on what was happening and to report to the company owner, employees are likely to fear—not without reason—that reprisals for pro-union activity may take place. It is not surprising that the courts have consistently upheld NLRB findings that such activity constitutes prohibited coercion. *E.g., NLRB*



*v. Rex Disposables,* 494 F.2d 588, 593 (5th Cir. 1974) (mere presence of supervisor in a car in parking lot near site of union meeting an unfair labor practice); *NLRB v. Speed Queen,* 469 F.2d 189, 191 (8th Cir. 1972) (same); *NLRB v. Shurtenda Steaks, Inc.,* 397 F.2d 939, 944, 946 (10th Cir. 1968) (attempt of foremen, who had transported employees to union meeting, to enter union headquarters was "plainly an attempt at surveillance and was a violation of the Act"); *Filler Prods., Inc. v. NLRB,* 376 F.2d 369, 374 (4th Cir. 1967) (unexplained presence of company president near union meeting combines with other circumstances to support a finding of surveillance). As was stated in *Hendrix Mfg. Co. v. NLRB,* 321 F.2d 100, 104-05 n. 7 (5th Cir. 1963), "surveillance becomes illegal because it indicates an employer's opposition to unionization . . . . [T]he law reasons that when the employer either engages in surveillance or takes steps leading his employees to think it is going on, they are under the threat of economic coercion, retaliation, etc." With respondent unable to offer any justification for Pesicka's attendance, it is clear beyond doubt that such activity was coercive and in violation of this court's judgment.[10]

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[10]The Master made no findings respecting the motivation for or effect of (1) the regular submission of reports to Angle concerning employee Rodgers' conduct, including his union activities, or (2) Angle's instruction that Pesicka report to him whatever he could find out about the union, both of which practices appear to be established by uncontroverted evidence, or (3) the persistent surveillance of Rodgers' movement around the plant by other KRH personnel. The difficulty of making those determinations ourselves and the non-dependence of either the disposition or remedy in this case upon the determination of these questions makes it unnecessary for us to remand the case for further fact-finding. Our failure to reach these questions should not be construed as indicating that continuation of these practices would be found to be consistent with the purgation requirements we establish *infra.* In particular, we find it difficult to imagine a justification for reporting on the union activities of a single employee or following him continuously around the plant, even into the bathroom, *see* Tr. at 1374, circumstances whose legality is especially doubtful when the subject of the reports is a union ringleader who has more than once been illegally discharged.

2. *Pesicka's Alleged Statements that Angle "Would Rather Go to Jail than Sign a Union Contract."*

The Master found that Angle never said he would "rather go to jail than sign a union contract," but, again with understatement, noted that

> [t]here is some evidence that Pesicka told one of the employees that in his opinion Angle would rather go to jail than sign a union contract. Tp. 543-44. This was merely the expression of a personal opinion, not authorized or directed by Angle, and Angle specifically denied that this was his position when questioned as to Pesicka's statement by the same employee. Tp. 561-64.

Master's Report at 21.

It appears from the record that Pesicka made a statement of this sort on two separate occasions. The first, to which the Master referred, took place when Pesicka accosted employee Elsen and asked whether he planned to attend the union meeting, and responded to Elsen's affirmative answer by suggesting that he did not think joining a union would make much of a difference. Pesicka also stated that if the employees joined the union and went on strike, they would be walking on the highway with the picket signs forever, adding either that Angle said he would go to jail, or merely that Angle would go to jail, before he would sign a contract. Tr. at 539-44.

On another occasion, Pesicka expressed similar sentiments to Elsen and employees Luft and Brack, stating that the Board was becoming fed up with and was about to drop "the whole thing," that the employees could never "whip" Angle because he was too strong, did not need



to operate the KRH plant, and "would never sign a union contract." Tr. at 591-92.[11] Although Brack's testimony about this conversation appears to have been uncontroverted, the Master omitted mention of it in his findings. We find no reason, however, to so discredit Brack's testimony as to find that this second conversation did not take place.

The coercive effect of these statements could hardly be plainer. *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969); *NLRB v. Varo, Inc.*, 425 F.2d 293, 299 (5th Cir. 1970); *International Union, United Automobile, Aerospace & Agric. Implement Wkrs. v. NLRB*, 392 F.2d 801, 806 (D.C. Cir. 1967), *cert. denied*, 392 U.S. 906 (1968); *Bakery Workers v. NLRB*, 76 L.R.R.M. 2560 (D.C. Cir. 1971) (per curiam), *enf'g in relevant part* 171 N.L.R.B. 700 (1968); *International Union of Electrical, Radio & Mach. Wkrs. v. NLRB*, 383 F.2d 230 (D.C. Cir. 1967), *enf'g in relevant part* 159 N.L.R.B. 1795, 1797-98 (1966), *cert. denied*, 390 U.S. 904 (1968). Rather than arguing otherwise, respondent hinges his argument on the Master's observation that Angle later told Elsen that he would sign a union contract. *See* Tr. at 561-63. However, that sentiment was never communicated to Luft and Brack and thus cannot cure the coercive effect of Pesicka's statement to them.[12] We thus find ourselves compelled to reject the

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[11]Other statements made by Pesicka in the course of this conversation deserve note as well: that if the employees would do their job and not complain so much, they would probably even get a raise as soon as Rodgers gets out of there, and that Rodgers is the whole trouble. Tr. at 592. In a later conversation, Pesicka told Elsen and Brack that "Rodgers isn't going to get any back pay." *Id.* at 594. The Master made no findings dealing with the uncontroverted evidence that these statements were made.

[12]That being so, we need not consider whether or in what circumstances such a denial by a management official might cure the coercive effect of a statement by a subordinate official, for

*(Footnote continued on following page)*

Master's findings because (1) they fail to note the apparently uncontroverted fact that the second conversation with Luft, Brack and Elsen took place, and (2) they once again rest upon an erroneous view of the law respecting Angle's liability for Pesicka's statement.

*3. Angle's Notation on the Posted Notice Required by NLRB Order.*

The Master's findings regarding this incident were as follows:

> On February 16, 1972, Angle posted at the KRH plant the notice required by the Board and by the order of this Court indicating that he would cease and desist from the practices found to have been violative of the act. The notice (Board's Exhibit 50) included the statement, "I will not grant wage increases to discourage employees from adherence to, or activities in behalf of, the above Union, or any other labor organization—but nothing in the preliminary decision of the trial examiner requires that I rescind or cancel any wage increase or other benefits heretofore granted." In July, 1972, Angle underlined the words of that paragraph, "I will not grant wage increases" and added in the margin of the notice the handprinted words "U.S. Gov't NLRB has this court order. Angle can *not* give any KRH employee a raise in salary." Tp. 350. He left the notice with the marginal note posted at the plant up to the time of the

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Footnote Continued—

it makes no difference to either the disposition of the case or the remedy ordered whether we find the statement by Pesicka to Elsen alone to have violated this court's judgment. Nor do we have to rule on the dubious suggestion that the first statement was not coercive if couched in terms of Pesicka's opinion of what Angle might do.



> hearing. His action in so doing was ill advised and not calculated to restore good relationship with his employees but, the sixty-day posting period having elapsed, was not violative of the Court's order.

Master's Report at 22.

The Board excepts to this finding on the ground that the Master misconstrued the thrust of the allegation of contempt. The Board argues not that respondent failed to comply with the posting requirements of the order, but rather that the notation was itself a coercive statement by Angle that violated the part of the order prohibiting restraint or coercion of employee rights. The Board notes—properly, we think—that the refusal to grant *any* wage increases goes far beyond a prohibition of *discriminatory* increases. The Master made no finding regarding this theory, but in this instance that need not prevent us from supplementing his findings. He found that the notation was made—a fact not really controverted—and, once again, the coercive effect of the statement could hardly be clearer, as it denigrates the Board's remedial mechanism and threatens to withhold benefits because of union activity. *See, e.g., International Union, U.A.A. & A.W. v. NLRB, supra,* at 805-06; *International Union of Electrical, Radio and Mach. Workers v. NLRB, supra, enf'g in relevant part* 159 N.L.R.B. 1795, 1797-98 (1966), *cert. denied,* 390 U.S. 904 (1968). We thus find this notation to have been contemptuous.[13]

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[13]Petitioner at pp. 38-39 of its brief also excepts to the Master's failure to make findings regarding three conversations in which Angle is alleged to nave made coercive statements. For reasons stated in notes 10, 12 *supra,* we need not struggle with the difficulty of making *de novo* findings ourselves as to these matters. Once again, however, we find it appropriate to comment that our failure to make such findings does not in any way indicate a view that the conduct involved was legal.

## IV. Rodgers' Reinstatement

The Board decisions and orders which this court enforced found Angle's two discharges of employee Rodgers to have been illegal and required his reinstatement.[14] The Board's exceptions to the Master's finding that respondent did not violate this court's judgment outline two distinct aspects of Angle's alleged contumacy, which we consider independently.

### A. *Was Rodgers Reinstated to the Proper Position?*

The Master's findings as to whether Rodgers was restored to the appropriate job classification were as follows:

> A. During Rodgers' earlier employment at KRH and at the time of his discharge, the plant's operations were conducted by one "senior operator" and two "junior operators" on each shift, with no other on-site supervision. Rodgers' position was described as "senior operator" and his pay was $3.75 per hour. Angle maintained before the Board that Rodgers was a supervisory employee within the meaning of the Act. On the basis of Rodgers' testimony that he exercised no supervisory functions, the Board, sustained by this court, decided that Rodgers was not a supervisory employee.
>
> B. During Rodgers' first period of employment it was Angle's belief that the "senior operators," including Rodgers, were supervisors and he looked to each of them, while on duty, to supervise the work

[14]The NLRB's orders in both 176 N.L.R.B. 1032 (1969) and 176 N.L.R.B. 1037 (1969) required Angle to offer to Arel Rodgers immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed.



> of the other employees on his shift. After the decision that the "senior operators" were not supervisors, Angle, in order to provide constant supervision of the plant and its operations, tried various organization plans culminating in the one in effect at the time that Rodgers was reinstated. Under this plan, the plant superintendent was in charge of all operations and an "Operations Manager" was in charge of each shift, four in all. (Other supervisory positions were designated as managers of maintenance, instruments, office and inventory). The superintendent and all managers exercised supervisory functions. The superintendent and the managers together constituted a supervisory level above the positions theretofore labeled "Senior Operators" and these positions, previously designated as "Senior Operators," became "Chief Operators." At the non-supervisory level in plant operations there was a "Chief Operator" on each shift, together with three or four other plant employees. The highest non-supervisory position in the organization was that of Chief Operator and, when Rodgers was reinstated it was to that position. The hourly wage for that position being $3.70 per hour [sic].

Master's Report at 9-10.

We are in agreement with the Board that the Master's findings appear implicitly to rest upon an erroneous conception of the law. For it is not the law that an employee who is illegally discharged and who, but for that discharge, would have been promoted to a supervisory position, does not have to be reinstated to a supervisory position. Rather, the governing standard was stated long ago in *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953):

> At the time the discrimination took place, [Rodgers] was clearly a protected employee, and his prospects for promotion were among the conditions of his employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected.

The reasoning in *Bell Aircraft* was approved, in a somewhat different context, by the Ninth Circuit in *Golden State Bottling Co. v. NLRB*, 467 F.2d 164, 166 (9th Cir. 1972):[15]

> The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. NLRB v. Bell Aircraft Corp., 206 F.2d 235, 236-37 (2d Cir. 1953).

In affirming the Ninth Circuit's decision, the Supreme Court quoted and explicitly approved the very passage quoted above. *See* 414 U.S. at 188.[16]

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[15]*Golden State* involved a job reorganization by an employer that shifted the status of driver positions from "employee" to "independent contractor," the latter being unprotected, *see* 29 U.S.C. § 152(3) (1970).

[16]The rule of *Bell Aircraft* does not unduly restrict the ability of an employer to manage a plant through his supervisors. For under the compromise struck by the Taft-Hartley amendments, in exchange for a promotion to a supervisory position, an employee may be required to break off his union activity and forfeit protection under section 7. Were Rodgers to be offered reinstatement as a supervisor, he could be put to that choice. And if after accepting a supervisory position and having had a reasonable time in which to comply with an employer's demand that he dissociate himself from union activity, a former employee reinstated to supervisory status continued to participate in union activity, that participation could ordinarily constitute the basis for discharge, although plainly a supervisor could not properly be discharged because of his union activity while an employee.



The question then raised is whether Rodgers would have become an Operations Manager but for his illegal discharge. We are handicapped by the Master's failure to make findings on this issue, but we believe the record is clear enough to enable us to make that determination ourselves. All of the employees who were formerly Senior Operators—and only those employees—were promoted to Operations Manager. Tr. at 105-06. Two of these four were also employed in 1966 when Rodgers was a Senior Operator, and at the time of Rodgers' discharge in 1967 they were being paid at the same rate as Rodgers. On the other hand, the position of Chief Operator to which Rodgers was restored was otherwise filled by employees who, before the reorganization, had been either Assistant Senior Operators (also called Junior Operators) or ordinary employees. Tr. at 110-12; Respondent's Exh. MM; Petitioner's Exh. 12.

The only reason that respondent offers for the proposition that Rodgers would not have become an Operations Manager is the vague assertion that he was not qualified, cooperative, or honest. That assertion rings hollow in light of (1) the Board's twice having rejected that very argument as a pretext when presented in connection with the 1966 and 1967 discharges of Rodgers, *see* 176 N.L.R.B. No. 115, slip op. at 23; 176 N.L.R.B. 1037, 1039, 1042; (2) Rodgers' having been employed in 1966 and reinstated in 1967 as a Senior Operator, a position that Angle contended was supervisory, (3) the depth of Angle's long-standing and uncontroverted dislike of Rodgers, a union ring-leader, and (4) the long history of Angle's anti-union animus.

Upon consideration of all of this undisputed evidence, we are left with the "definite and firm conviction" that Rodgers would have become an Operations Manager but

for his illegal discharge. In this circumstance, the lack of an explicit finding on this question by the Master does not prevent us from holding that, under the legal standard of *Bell Aircraft*, Angle must be found in civil contempt of this court.

B. *Was Rodgers Subjected to Burdensome Working Conditions in his Position as Chief Operator?*

In light of our ruling that Rodgers should have been reinstated as an Operations Manager, we think it superfluous to discuss whether to adopt the Master's findings, *see* Master's Report at 10-13, rejecting the Board's allegation that Rodgers' reinstatement as a Chief Operator was defective because of the failure to assign him the full responsibilities of the lower position. In order to provide respondent with guidance for compliance with our order, we note our skepticism about the cogency of the Master's findings: in the event an individual is not fully equipped to perform a job due to his absence therefrom during an illegal discharge, it is the employer's obligation to take the *initiative* in retraining him as expeditiously as possible; the employer also bears responsibility for ensuring that those who immediately supervise the reinstated individual also take such initiative; that a training period substantially longer than that served by other new employees is suspect absent special explanation; and that allegedly inadequate performance is a dubious justification for a lengthy training period if no effort has been made to eliminate the inadequacy or even to communicate it to the individual.

## V. Alleged Illegal Discharges.

Petitioner finally alleges that three episodes resulting in the discharge of four employees violated the court's



judgment barring discriminatory discharges. We consider these in turn, each in light of the accepted principle that a discharge is illegal if motivated in any part by anti-union animus. *See, e.g. Ridgely Mfg. Co. v. NLRB,* 510 F.2d 185, 186 (D.C. Cir. 1975) (per curiam); *Local 152, Teamsters v. NLRB,* 343 F.2d 307, 308-09 (D.C. Cir. 1965).

A. *The Discharge of Arel Rodgers and Hilary Luft.*

The Master's findings of the facts surrounding this discharge were as follows:

> A. On July 11, 1972 Hilary Luft was involved in an altercation with one Wagner, a fellow employee, on company premises and on company time. Angle suspended both men and arranged for Pesicka to hold a conference with them on July 12, 1972, for the purpose of reinstating them with a warning of dismissal if there should be fighting on company time. Luft was advised by Pesicka of his reinstatement before the conference. Rodgers, without any request from Luft, and having knowledge that Luft was to be reinstated, persuaded Luft to insist that at the conference Luft be represented by Rodgers, acting as a union steward or union representative. At that time there was no contract with the union and no grievance procedures had been established. Neither Angle or Pesicka had any notice of any claim by Rodgers or by anyone that Rodgers was a union steward. Luft and Rodgers appeared together at the KRH office on July 12th and insisted on Rodgers' attendance at the conference, to the point of a physical struggle between Rodgers and Wagner. Both Luft and Rodgers were discharged for insubordination.
>
> B. Luft and Rodgers unreasonably insisted upon Rodgers' attendance at the conference since both knew

that no further disciplinary action was contemplated. Their conduct warranted their discharge.

Master's Report at 13-14.

These findings relate to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In that case, the Court affirmed an NLRB decision that "§7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline. . . ." *Id.* at 256.

The Master's exoneration of Angle on this score appears to rest upon two reasons for finding *Weingarten* inapplicable: first, that both employees knew that no further disciplinary action was contemplated, and second, that there was no contract or grievance procedure, nor any notice that Rodgers claimed to be a union steward. We believe, however, that neither of these distinctions is sustainable.

We are unable, in light of record evidence not referred to by the Master, to uphold his finding that Luft could not reasonably believe that discipline would be imposed. There is no dispute that, as the Master found, Luft had been informed that his suspension would be lifted at the scheduled meeting. The Master's report, however, fails to consider testimony in the record that was uncontroverted and not specifically discredited, describing subsequent events, at the outset of the meeting itself, that we believe gave rise to a reasonable belief that discipline might be imposed. When the two employees arrived for the meeting, Pesicka inquired why Rodgers was present, and when informed that he intended to act as a steward or representative, Pesicka replied that there was no need since there was neither a union nor a contract. Tr. at



509-09, 755, 798, 1063. Pesicka then told Luft he would be reinstated but that there was to be no more fighting. Tr. at 1063. Luft then stated "if that's all you have to tell me then, thank you, and I'll see you this evening then." *Id.* But Pesicka replied "no, no, there's something else I have to tell you." *Id.* at 754-55, 1063, 1228-29.

That something else was not revealed, nor, when Luft then reiterated his insistence upon Rodgers' presence, did Pesicka indicate that representation was unnecessary because no discipline would result. Instead, Pesicka decided to call Angle in Wichita, and after hearing of Luft's insistence that Rodgers represent him, Angle told Luft that he had initially thought of suspending him for a couple of weeks, but because he insisted on having Rodgers hold "his damn hand," they would both be discharged. *Id.* at 757, 1065.

Angle's own statement and the fact that Wagner—the other employee in the altercation—was reinstated after one day, *id.* at 1065, leave little room for doubt that the reason for the discharges was the insistence upon representation at the meeting. And we believe that in light of Pesicka's statement—not discussed by the Master—that there was "something else" he wished to say to Luft, a finding that an employee might not *reasonably* fear discipline in those circumstances was clearly erroneous. That statement superseded any earlier understanding Luft might have had that no discipline would be forthcoming; and no one disputes that Luft's conduct in the altercation was of the kind for which discipline is thought appropriate. In addition, the statement immediately followed, and contrasted in tone with, Pesicka's indication that the suspensions would be lifted, *i.e.*, that no discipline would be imposed.

Indeed, it is hard to see what Luft should have reasonably believed the purpose of the scheduled meeting was if discipline was out of the question, particularly since Pesicka never indicated that no discipline would be imposed and hence no representation would be needed. Plainly, the words in question are far too imprecise to suggest clearly that the "something else" was the possibility of future discipline; by the same token, they are far too imprecise to dispel all reasonable fears that discipline might result.[17] Particularly in view of the Master's failure to consider explicitly what we believe to be the critical testimony, we find ourselves forced to reject as clearly erroneous his finding that Luft could not reasonably fear the imposition of discipline.[18]

The second reason implicitly relied upon by the Master in his finding of no contempt—that Rodgers did not represent a union in connection with an established grievance mechanism—can be disposed of more easily. As even the dissenters in *Weingarten* realized, *see* 420 U.S. at 270

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[17]Our conclusion that Luft's fears must be thought reasonable is reinforced by the uncontroverted evidence that Wagner was an anti-union employee and a friend of Pesicka's, so that Luft might well expect that he would be assigned all blame and disciplined for the incident.

[18]We need not discuss the Master's finding emphasized by respondent, that Rodgers, without any request from Luft, persuaded him to insist upon representation, for we do not believe the question of what motivated Luft to assert his Section 7 rights is material to the issue presented.

We note that respondent's brief cites to NLRB v. Quality Mfg. Co., 481 F.2d 1018 (4th Cir. 1973), to support the proposition that there is no right to the presence of a representative when there is no reasonable fear of discipline. This argument becomes immaterial in light of our inability to adopt the Master's finding that there could be no such reasonable fear. We refer to this, however, to reiterate our dissatisfaction, *see* note 4 *supra*, with the kind of brief writing that results in citation of a circuit decision with no indication whatsoever that it has been reversed by the Supreme Court, *see* 420 U.S. 276 (1975).



n.1 (Powell, J., dissenting), that decision's elaboration of Section 7 protests the right to act in concert, not merely the right to act in concert with a recognized union. *See generally NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

We thus find respondent in civil contempt for the discharges of Luft and Rodgers.[19]

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[19]That Rodger's discharge, as well of Luft's, violated our order and the Act is clear from ILGWU v. Quality Mfg. Co., 420 U.S. 276, 280 (1975) (companion case to *Weingarten*).

Luft and Rodgers were temporarily reinstated pursuant to an order of this court, pending completion of contempt proceedings, *see* note 2 *supra*, and returned to work in September of 1972. In May of 1973, both men wrote Angle, announcing that they were terminating their employment, and stating: "I cannot continue to work under these conditions until you comply with the court's orders." The Board alleged that the men were constructively discharged, but the Master disagreed. Master's Report at 17.

The Board's exceptions to the Master's report challenge this finding. The exceptions themselves, however, are nothing more than a sentence-by-sentence objection to virtually every aspect of the Master's Report. In the Board's brief, the only references to this matter are (1) its inclusion in the statement of issues, and (2) a statement in passing that the Board had alleged that the men were constructively discharged, but that the Master found otherwise. Nowhere does the Board provide arguments or direct us to record evidence that might establish the commission of reversible error by the Master. We believe that in excepting to a master's findings, a party cannot rely upon such a scattershot approach. We cannot be expected to undertake a complete review of the voluminous record evidence and then proceed, in effect, to act, at least in the first instance, as that party's advocate to determine whether the unadorned exception has any merit. We therefore decline to overturn the Master's finding on this issue.

As a consequence, we believe that Luft and Rodgers are not entitled to the remedy of a reinstatement order, for the temporary reinstatement order did effect their return to the plant, and their subsequent departure must be considered to have been voluntary. Similarly, the back pay to which they are entitled should encompass the period from the illegal discharge to their departure from the plant.

B. *The Discharge of Brian Brack.*

The Master explained Brack's discharge as follows:

> C. On August 14, 1972 (although the testimony as to the date is conflicting, I find the date to be August 14, 1972) Brack was assigned the duty of taking and recording the reading of the gauges on the various compressors at the plant, the readings to be taken hourly. This duty was vitally important to the safe and efficient operation of the plant. For one period of at least two hours Brack remained continuously in the control room and for another period of at least one-half hour he remained continuously in the maintenance shop. No compressors were located in either the control room or the maintenance shop.
>
> D. Pesicka reported to Angle Brack's non-attention of duties. Angle investigated, believed the report to be true, and discharged Brack for nonperformance of assigned duties.
>
> E. Brack's discharge was justified and proper.

Master's Report at 14.

This finding has evidentiary support. Pesicka stated unequivocally that he had seen Brack in the control room for a continuous two-hour period, and in the maintenance room for another thirty minutes. Tr. at 514-16. This testimony was corroborated by Brack's own admission that he was delinquent. *Id.* at 670. A transcript of the telephone conversation at the end of which Brack was discharged reveals that Angle was genuinely, and properly, concerned with the serious damage to the plant that a failure to take compressor readings could cause. Unlike many of Angle's other conversations or statements, this



conversation is not laced with antiunion declarations, nor does it indicate an inability to accept the legitimacy of union activity. Petitioner's Exh. 37. The fact that an employer has exhibited antiunion bias in some circumstances does not necessarily mean that *every* discharge of a union adherent is illegal, and upon reviewing the record we find no basis for holding the Master's finding to be clearly erroneous.

C. *The Discharge of Harold Straub.*

The Master explained Straub's discharge as follows:

> F. On November 16, 1972 Straub informed Pesicka that he had been advised by a physician that he should change jobs for health reasons. Pesicka reported the statement to Angle, who undertook an investigation by writing letters to Straub and to two physicians known by him to have treated Straub in the past. Straub did not respond to Angle's inquiries and the responses of the two physicians were to the effect that neither had advised Straub to change jobs.
>
> G. Straub did not testify before the Master but in a deposition taken in this proceeding and received in evidence, he admitted that the statement he had made to Pesicka on November 16, 1972 to the effect that he had received medical advice to change jobs was false. Straub knew that the letter from Angle, dated November 28, 1972, was precipitated by his statement to Pesicka but he took no steps to deny, correct or explain the false statement.
>
> H. There is no evidence that Straub was coercively interrogated about union activities as alleged by the Board. Pesicka denied that he had warned Straub not to become involved in union negotiations, as al-

leged by the Board. Straub did not take the witness stand to contradict Pesicka's testimony and I find that Pesicka's uncontroverted testimony should be credited.

I. I find that Straub was terminated for failing to respond to legitimate requests for information by his employer; that he made an admittedly false statement which he took no steps to deny, correct or explain. His discharge was justified and proper.

Master's Report at 14-15.

The Board argues that this finding is clearly erroneous when measured against largely undisputed evidence in the record. In mid-August, 1972, Straub joined the union bargaining committee, and Angle knew that he had been attending bargaining meetings, Tr. at 326. On November 14, 1972, Straub and Pesicka engaged in a conversation which was described somewhat differently in various testimony; but what is important in determining the motivation for the discharge is that on November 16, Pesicka sent Angle the following report:

I got Harold Straub in a little conversation. he [sic] has been having health problems, & the doctor said it was his job & advised him to change jobs.

I asked him what he was worried about. he [sic] said their [sic] is going to be a big shake down here & George Angle was going to be in real trouble from the Feds. I said how come & he said for firing men for union activities, & for Angles [sic] actions against the men. I asked him who told him all this & he said Rodgers did.

he [sic] said he had given the Feds. some statements & he was scared of what our lawyers would do to him on the stand he wasn't sure what he had said to them.



I think they are using him cause you can talk him into anything. if [sic] you tell him he looks sick, 1 hr. later he is.

Petitioner's Exh. 49; *see* Tr. at 492.

On November 27, Straub attended another bargaining meeting and spoke in favor of a seniority provision to prevent favoritism, emphasizing that sons of both Angle and Pesicka were employed at the plant. Straub responded to the company's argument that seniority might place unqualified personnel in positions they could not handle by stating that he thought there were only two people at the plant who could not learn his job as Chief Operator within thirty days. Tr. at 1254-56, 1515-16. On November 28, Angle wrote Straub, expressing great concern for his physical and mental health in view of Straub's statement that he was advised by a doctor to consider changing his job. The letter also stated: "Mr. Straub, as I understand it, your health condition may involve mental problems brought about in part by statements you have signed in the past." Angle concluded by suspending Straub from work until he had been examined by his doctors and Straub was advised that the company was satisfied with the medical reports. Petitioner's Exh. 38.

Straub was examined by one physician on November 29, and on November 30 Angle received a letter from him finding Straub's mental and physical condition to be fine and describing Straub as employable without reservation. Petitioner's Exh. 41.

Angle immediately wrote Straub, stating that the doctor was not the one who advised Straub that he should consider quitting, and asking him to consult the other doctors he had been going to. Petitioner's Exh. 42. Four days later, on December 4, Angle again wrote Straub, re-

iterating what was said in the November 30 letter and further stating that "whatever problems you have are more nervous or mental problems instead of physical." Angle indicated that the principal bases for that judgment were (1) Straub's having called the plant on November 28th before picking up his paycheck to ensure he was not barred from the premises, and (2) his statements at the November 27 bargaining meeting that all but two KRH employees could learn his job within 30 days, that seniority was needed to prevent favoritism, and that he was nervous working under Pesicka's supervision when his relatives were also working at the plant. Petitioner's Exh. 43; *see* Tr. at 1515-16.

A letter dated December 2 from another physician to Angle confirmed the lack of any mental or physical condition. Petitioner's Exh. 44. Angle, still not satisfied, sent Straub a questionnaire about his condition, which included an inquiry, without apparent foundation, as to whether "[t]he pressure of your job and your nervousness has caused your wife concern." Petitioner's Exh. 45.

One week later, on December 20, Angle wrote Straub again insisting that he complete the questionnaire. Straub evidently communicated with the Board, and on December 21 a Board attorney wrote Angle's attorney, expressing his view that the purpose of the questionnaire was to harass Straub because of his union activity, and indicating that the Board had advised Straub he need not complete it. Petitioner's Exh. 48. On December 26, Angle dismissed Straub by letter, noting that the copy of the Board's letter to Angle's attorney "is further evidence that confirms everything I have written to you earlier today," and that "You did not intend to answer my letters of December 13 or December 20th. You further had no intention of returning to work, you simply called the NLRB



in Kansas City/Washington, D. C. to ask them to add additional charges against George Angle in your behalf." Petitioner's Exh. 47.

Were we reviewing a finding that Straub's discharge was legal by the NLRB in an unfair labor practice proceeding, we *conceivably* might feel compelled to defer to the Board's expertise. But in reviewing a Master's finding, where less deference is required, *see, e.g.*, note 3 *supra*, we believe we must reach a contrary finding and reject that of the Master as clearly erroneous. To begin with, the Master explains Straub's discharge in part by finding that his statement to Pesicka on November 14 that he had been advised to change jobs was false, and he made no attempt to explain or correct it. However, respondent points us to no evidence, and we have found none, to indicate, assuming the statement to have been false, *see* Tr. at 1525-26, that Angle was aware of or relied upon the falsity in deciding to discharge Straub. Thus, the only possible legitimate motivation for Straum's discharge is concern about his health and his failure to respond to Angle's request for information. The former seems implausible in light of (1) Angle's having been told independently by two doctors that Straub was fine, (2) the lack of any evidence in the record that Straub had any condition that had in the past impaired his work performance, (3) Angle's reliance in his letters of November 28, December 4, and December 26 on Straub's signing statements for NLRB proceedings, his views on seniority expressed at bargaining, or his communicating with the Board in December as indicative of a mental problem, and (4) Angle's knowledge that Straub was suggestible in connection with his health. And if the concern for Straub's health seems to be a sham, so too must the failure to complete a questionnaire investigating Straub's alleged health problems.

The evidence just mentioned not only refutes the Master's findings as to why Straub was discharged, but points to antiunion animus as the reason. Angle's inability to separate alleged psychological problems from union activities and his unwillingness to accept the opinions of two physicians selected by himself indicates that Straub's discharge cannot be considered in sterile isolation from Angle's unyielding opposition to unionization. Straub was known by Angle to be an active union supporter. And it is surely highly probative that Straub was first suspended not shortly after November 18, when Angle first received Pesicka's report, but rather one day after November 27, the day on which Straub discussed seniority provisions at a bargaining session—a discussion to which Angle twice referred in his subsequent correspondence with Straub. The very strong evidence in the record—not considered by the Master—that Angle was motivated by improper motives, and the highly implausible nature of the explanation offered by respondent and the Master for Straub's discharge, lead us to reject the Master's finding as clearly erroneous and to find Straub's discharge to be illegal.

## VI. Conclusion.

Although ten years have gone by since charges of unfair labor practices at KRH were first made, respondent's opposition to and interference with the right of his employees to unionize appears to be no less stubborn. The violations of the National Labor Relations Act are not only persistent, but they also flagrantly contravene the national labor regulatory policies enunciated by the Congress. The order we issue today is designed to remedy past, and to prevent future, noncompliance.



## Order

Wherefore, in acceptance with the foregoing opinion, IT IS ORDERED THAT:

1. George A. Angle is hereby found in civil contempt of this court.

2. Respondent may purge himself of contempt by

(a) Fully complying with and obeying the said judgment of this court, and each of the provisions of the board orders thereby enforced.

(b) Refraining from instituting changes in any term of employment without providing the Union with notice and a reasonable opportunity to bargain about such changes.

(c) Making employees whole, after supplemental proceedings have been held by the Board to fix the amount necessary to reimburse the employees for any losses they may have suffered by virtue of any increased insurance premiums resulting from the employer's unilateral change in insurance coverage or plans, and any diminution in earnings resulting from the employer's unilateral change in the plant job and wage structure and classifications, subject to review by this court.

(d) Offering immediate and full reinstatement to Harold Straub to his former or substantially equivalent, position, without prejudice of his seniority and other rights and privileges; and making him whole, after supplemental proceedings have been held by the Board to fix the amount necessary to reimburse him for any loss he may have suffered by reason of respondent's failure to comply with the decree, subject to review by this court.

(e) Preserving and making available to the Board upon request, for examination and copying, all the Company's correspondence, books, records and other documents necessary or useful to determine the amounts due to make whole the employees as set forth in paragraphs 2(c) and 2(d).

(f) Refraining from imposing any undue and burdensome conditions upon Straub upon his reinstatement.

(g) Refraining from discriminatorily applying work rules against Straub after his reinstatement to discourage participation in protected activities.

(h) Refraining from engaging in surveillance of Union meetings; stating that the employer will never sign a contract with the union; threatening to go out of business or close the plant on account of the union; stating that employees will not receive raises on account of the union; seeking to discourage resort to the Board's processes; denigrating the efficacy of Board orders; coercively interrogating employees about their union activities and sympathies and the union activities and sympathies of their fellow employees; threatening that collective bargaining would be futile; threatening the employees with violence on account of their union activities; warning employees not to get involved in the collective bargaining negotiations; defacing or permitting defacement of posted Board orders or in any other manner interfering with, restraining or coercing employees in the exercise of their rights as guaranteed by Section 7 of the Act.

(i) Immediately posting in conspicuous places, including all places where notices to employees are customarily posted, for a period of sixty (60) consecu-



tive days, copies of the contempt adjudication and of a notice in the form prescribed by the Board and signed by George A. Angle which states that Angle has been adjudicated in civil contempt of court for failing and refusing to comply with the decree of this court and that he will take the action in purgation ordered by the court. Said notices and copies of the contempt adjudication shall be maintained in clearly legible condition throughout such posting period and Angle shall assure that they are not altered, defaced or covered by any other material.

(j) Immediately mailing to each of his current employees and all former employees who were employed by him since the entry of the court's decree on September 10, 1971, a copy of the aforesaid signed notice and of the contempt adjudication; and providing the Board's Regional Director with proof of such mailing.

(k) Filing sworn statements with the Clerk of this court, and a copy thereof with the Director of the Seventeenth Region of the Board, within ten (10) days after the entry of adjudication and again at the end of the posting period, showing what steps have been taken by Angle to comply with the court's directions.

(l) Reimbursing the Board for all costs and expenditures, including reasonable counsel fees, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding.

(m) Within thirty (30) days of the date of this order, assembling all the employees in the plant upon at least five (5) days notice and in the presence of all such employees instructing their supervisors to

comply with the provisions of the Board's orders as enforced by the court's decree, prohibiting coercive interrogation, threats, discriminatory discharges or suspension, discriminatory terms and conditions of employment, oppressive terms and conditions of employment, surveillance or any other interference, restraint or coercion to discourage exercise by employees of their rights as guaranteed by Section 7 of the Act.

(n) Upon request of the Union made within six (6) months of the adjudication, immediately granting the Union and its representatives reasonable access for a one-year period to company bulletin boards and all places where notices to employees are customarily posted.

3. For the purpose of assuring compliance with the provisions of this order, this court hereby imposes a compliance fine against respondent of $6,000.00 for each and every violation of the foregoing provisions, and a further compliance fine of $1,000.00 per day for each and every day that each such violation continues. The court reserves jurisdiction to issue writs of attachment, to take other appropriate action against respondent, and to amend this order or issue such additional orders as it deems appropriate.



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1976

No. 23,295
23,300

Oil, Chemical and Atomic Workers
International Union, AFL-CIO,
Petitioner

v.

National Labor Relations Board,
Respondent

George A. Angle, d/b/a Kansas Refined
Helium Company,
Intervenor

George A. Angle, d/b/a Kansas Refined Helium Company,
Petitioner

v.

National Labor Relations Board,
Respondent

United States Court of Appeals
for the District of Columbia Circuit

Before: McGowan and Tamm, Circuit Judges; Matthews*, United States Senior District Judge for the District of Columbia.

**ORDER**

(Filed January 4, 1977, George A. Fisher, Clerk)

It is hereby ORDERED by the Court that footnote 19 of the opinion in the above-captioned cases be amended in the following respects:

(1) Delete the last paragraph and substitute the following:

Nevertheless, in fashioning appropriate relief for Rodgers and Luft, we need not reach the significance of their voluntary departures from the positions to which they had been temporarily reinstated. *Compare* Oil, Chemical & Atomic Workers v. NLRB, No. 75-1065 (D.C. Cir., June 28, 1976). The Master's findings indicate that following this court's temporary reinstatement order Rodgers and Luft engaged in attempts to manufacture evidence on which to base contempt charges against Angle. Specifically, the Master found that the circumstances surrounding Rodgers' and Luft's acceptances of temporary positions, as well as their departures, reflected a concerted effort to fabricate evidence of noncompliance with this court's order. *See* Master's Report at 16-17. The Master further concluded that Rodgers, "by his purposeful failure to obey reasonable instructions, and by a deliberate course of conduct calculated to make Angle's efforts to require him to perform duties properly expected of him as an employee appear to constitute noncompliance with the Court orders, did interfere with and impede Angle's efforts to comply with the Court's orders." *Id.* at 23. Keeping in mind that the Master had the opportunity to observe Rodgers' and Luft's demeanor in testifying, we cannot say that his findings regarding their intentions were clearly erroneous. As a consequence, we believe that Rodgers and Luft are not entitled to the remedy of a reinstatement order. Notwithstanding Angle's contumacious conduct, he should not be forced to live with hostile employees who have conspired to cause unnecessary trouble. *See, e.g.*, NLRB v. Nat'l Manufacturing Co., 315 F.2d 280, 286 (7th Cir. 1963); NLRB v. Apico Inns, 512 F.2d



1171, 1175 (9th Cir. 1975). Nor can we condone action designed to subvert the integrity of enforcement proceedings. *See, e.g.*, NLRB v. Magnusen, 523 F.2d 643 (9th Cir. 1975). Even so, Rodgers and Luft should not be deprived of backpay which accrued prior to their misconduct. Since it is difficult to define the precise point at which their acts in cumulative effect precluded reinstatement, and in order to avoid further delay in this protracted litigation, we think the Board should award backpay covering the period from their illegal discharges until their voluntary departures from the plant.

(2) Change line 1 of the footnote to read "as well as" rather than "as well of."

(3) Amend line 3 of paragraph 2 to read "note 2" rather than "note 8."

(4) In line 6 of the third paragraph, change the word "is"to"in."

It is FURTHER ORDERED by the Court that the order in the above captioned cases be amended by substituting the following for paragraph 2(d) on p. 39:

(d) Offering immediate and full reinstatement to Harold Straub to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges; and making Straub, Arel Rodgers, and Hilary Luft whole, after supplemental proceedings have been held by the Board to fix the amount necessary to reimburse them for any loss they may have suffered by reason of respondent's failure to comply with the decree, subject to review by this court.

*Per Curiam*

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*Sitting by designation pursuant to Title 28 U.S. Code Section 294(c).

17-CA-3021
17-CA-3021-2
17-CA-3378

## NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PLEASE TAKE NOTICE that on June 7, 1976, as amended on January 4, 1977, the undersigned George A. Angle, d/b/a Kansas Refined Helium Company was

ADJUDGED IN CIVIL CONTEMPT OF COURT for having disobeyed a judgment of the United States Court of Appeals for the District of Columbia Circuit entered against me on September 10, 1971.

THE COURT HAS ORDERED me to take certain actions and to stop engaging in certain other activities and I hereby NOTIFY you that, pursuant to the Court's order, I will fully comply with each of the provisions as set forth below:

I WILL FULLY COMPLY with and obey the judgment of this Court entered on September 10, 1971, and the contempt adjudication entered June 7, 1976, as amended on January 4, 1977.

I WILL REIMBURSE Arel Rodgers and Hilary Luft for any monetary losses they may have suffered because of my failure to comply with the Court's judgment.

I WAS ORDERED by the Court to offer immediate and full reinstatement to Harold Straub to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges, and without imposing any undue and burdensome conditions or discriminatory work rules upon Straub. I have offered Straub reinstatement in accordance with the Court's order, but he has declined to accept my offer.



I HAVE BEEN ORDERED to, however, and I WILL REIMBURSE Straub for any monetary losses he may have suffered because of my failure to comply with the Court's judgment.

I WILL NOT make any changes in any term of employment without providing the Oil, Chemical and Atomic Workers International Union with notice and a reasonable opportunity to bargain about such changes and will bargain, upon request, with the Union.

I WILL REIMBURSE employees for any monetary losses they may have suffered by virtue of my changing, without notifying or bargaining with the Union, the insurance coverage or plans for employees and the plant jobs, wage structure and classification.

I WILL STOP doing the following actions:

i) engaging in surveillance of Union meetings;

ii) stating that I will never sign a contract with the Union;

iii) threatening to go out of business or close the plant on account of the Union;

iv) stating that employees will not receive raises on account of the Union;

v) seeking to discourage resort to the National Labor Relations Board's processes and denigrating the efficacy of Board notices;

vi) coercively questioning employees about their Union activities and sympathies and the Union activities and sympathies of their fellow employees;

vii) threatening that collective bargaining would be futile;

viii) threatening employees with violence on account of their Union activities;

ix) warning employees not to get involved in the collecting bargaining negotiations;

x) defacing or permitting defacement of posted Board orders;

xi) in any other manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

I WILL upon request of the Union immediately grant the Union and its representatives reasonable access for a one-year period to Company bulletin boards and all places where notices to employees are customarily posted.

THE COURT HAS FURTHER ORDERED that to prevent further violations of its Judgment and Contempt Order, it will LEVY A FINE of $6,000 for each future violation of the Court's order and $1,000 per day against me for each day that such violation continues and that I or any other officer or agent of the Company responsible for non-compliance with the order may be subject to body attachment, i.e., civil imprisonment.

George A. Angle, d/b/a Kansas
Refined Helium Company
(Employer)

Dated ..... By .....
(Name & Title)

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THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 Two Gateway Center, Fourth at State, Kansas City, Kansas 66101, Telephone: (816) 374-4518.